MILITARY HANDBOOKS FOR OFFICERS AND NON-COMMISSIONED OFFICERS

VOL. V.

MILITARY LAW

MILITARY LAW

ITS

PROCEDURE AND PRACTICE

BY

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PREFACE.

THE effect of recent legislation has been rather to complicate than to simplify the military code. Some anomalies have been swept away, but with them has also disappeared much of the simplicity which characterised the administration of military law under the Mutiny Act and Articles of War. Not only has the actual punitive code been largely increased in size, but the manner of carrying it out, on the Procedure of Courts-martial, has become so involved that the regulations concerning it require close attention. More help than was formerly necessary is now required by the student.

The present manual has been compiled by an acknowledged authority on the subject, in order to aid officers and non-commissioned officers in overcoming the many difficulties which attend the study of the legal part of their profession. It must be looked upon as an aid to, and not a substitute for, the ordinary legal military code. The method of arrangement is somewhat novel, and will, it is hoped, be found to have the merits of simplicity and ease of reference.

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Colonel R.A.

WALTHAM ABBEY, ESSEX.

ABBREVIATIONS USED.

S. 5	.	Section 5, Army Act, 1881.
M.A. 10	.	Section 10, Militia Act, 1882.
R.F.A. 20	.	Section 20, Reserve Force Act, 1882.
R. 30	.	Rule 30, Rules of Procedure, 1881.
Q. vi 40	.	Paragraph 40, section 6, Queen's Regulations, 1883.
G.O. 5/80	.	General Order No. 5 of 1880.
A.C. 10/82	.	Army Circular No. 10 of 1882.
P.W. 582	.	Paragraph 582, Pay Warrant of 1882.
Sm. 100	.	Paragraph 100 of Simmons' 'Court-Martial,' Seventh Edition.
O'D. 45	.	Page 45 of O'Dowd's 'Hints to Courts-Martial,' First Edition.
Cl. 190	.	Page 190, Clode's 'Military Forces of the Crown,' First Edition.
Ho. 180	.	Page 180, Hough's 'Precedents,' First Edition.
Sth. 15	.	Article 15, Stephen's 'Digest of the Law of Evidence,' Fourth Edition.

The large-sized figures in the margin refer to paragraphs on other pages.

After a considerable portion of this book was written the 'Official Manual of Military Law' was provisionally issued, and I have had the advantage of deriving from it the most recent authoritative decisions on disputed points. The actual form which this valuable work of reference will permanently assume is not yet decided, and I have therefore been unable to include it in the list of authorities to which marginal references have been made. I must express my cordial thanks to Colonel Parsons, Deputy Judge Advocate, for his valuable assistance in revising the proof sheets of this work.

September 1, 1883. S. C. P.

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MILITARY LAW.

CHAPTER I.

HISTORY OF MILITARY LAW.

1. MILITARY LAW. 2. MILITARY CODE—Written Code—Unwritten Code. 3. CIVIL LAW—Statute Law—Common Law. 4. CIVIL *versus* MILITARY LAW. 5. ORIGIN OF ARTICLES OF WAR. 6. ORIGIN OF MUTINY ACT. 7. ORIGIN OF COURTS-MARTIAL.

1. MILITARY LAW.—In order to maintain proper discipline in the army, it has been found necessary to confer special powers on the military authorities to enable them to deal with offences which it would be either dangerous or impossible to leave to the civil power.

The military law which governs the soldier in peace and in war, at all times and in all places, is regular in its procedure, is administered according to an authorised code, and deals only with soldiers and persons who are from circumstances subjected to the same law as soldiers.

It is embodied in the Army Act of 1881, which is part of the statute law of England, and is judicially recognised by all civil courts.

The administration of the code is simplified by means of Rules of Procedure, Regulations, and Orders, which lay down the manner in which the law is to be carried out by the military courts.

The principles of civil law are as far as possible observed, but its technicalities are laid aside.

2. THE MILITARY CODE consists of two parts:

(1) *The written code*, consisting of the Army Act, Rules of Procedure, Queen's Regulations, General Orders, Army Circulars, Royal Warrants, and Orders in Council. 9

(2) *The unwritten code*, or the customs or laws of war which cannot be rigidly defined, and depend on precedent and the practice of civilised nations in war. To it belongs also the procedure in cases not laid down by the existing code. S. 171 R. 131

3. CIVIL LAW.—The civil law of the realm is derived from two sources:

(1) *The statute law*, the various Acts of which have been passed by both Houses of Parliament and approved by the Sovereign, which constitutes the written code.

(2) *The common law*, or that derived from precedent and immemorial usage. It is sometimes described as 'judge-made law,' as it is mainly derived from the decisions of celebrated judges.

The tendency of modern legislation is to replace common by statute law as far as practicable.

4. CIVIL *versus* MILITARY LAW. — The civil law is binding upon all persons, and the fact of a man being a soldier in no way frees him from his obligations as a citizen. The soldier is bound to come in contact with the civilian in many instances, as in the case of billeting, impressment of carriages, tolls, and recruiting regulations, and hence it is clear that the statute military code must to a certain extent affect civilians.

Civil law is for many reasons inapplicable to military wants. Its code is too elaborate, and requires the services of trained administrators.

Many of the most serious military offences, such as disobedience of orders, insubordination, drunkenness on duty, sentry sleeping on his post, absence, &c., are not recognised as crimes. Above all, it is too slow in its action. In order to maintain discipline the commission of a military offence must for the sake of example be followed by prompt punishment. A striking instance of this occurred in 1862, when the passing of the Homicide Act for the speedy trial of soldiers charged by the military authorities with murder put at once an end to the crime of shooting at officers, of which several instances had occurred.

5. ORIGIN OF ARTICLES OF WAR.—The necessity of having some means of legally punishing soldiers for breaches of military duty existed from the earliest times.

Before standing armies were raised for the defence of the realm (A.D. 1660) the only troops kept up in time of peace as regular soldiers were the personal guards and retainers of the Sovereign, who were governed by royal prerogative, and liable to punishment like other royal servants. In time of war, however, 'articles' and 'ordinances' of war were issued by the Crown, or by the commander of an army with authority from the Crown, to govern the troops when actually engaged in hostilities. At the close of a war the army was disbanded, and the articles ceased to have effect.

The earliest code of articles of which record remains were those issued by Richard II. and Henry V. on the occasion of wars with France.[1] The punishments awarded for crimes were very severe, death and loss of limb being inflicted for comparatively trifling offences.

In accordance with the spirit of the times the military code gradually became more lenient, and during the wars of the Great Rebellion the articles in force assumed a

[1] Grose, *Military Antiquities.*

form differing but little from those finally abolished in 1879.

The passing of the Mutiny Act in 1689 created for the first time a *statute* military law, which forbade any punishment extending to life or limb being inflicted in the United Kingdom except in accordance with the Act, but otherwise no notice was taken of the action of Articles of War.

The royal prerogative as to making Articles for governing troops *abroad* in time of war was thus in no way interfered with, while military courts in time of peace were tacitly allowed to deal with minor offences so long as they did not infringe the limitations laid down by the Mutiny Act, or interfere unduly with the civil law.

In 1702 the power of the Sovereign to make Articles in time of war *abroad* was confirmed by statute, and in 1712 the power was expanded so as to affect troops abroad irrespective of there being war.

In 1718 the formation of Articles of War by the Crown for the government of troops at home was legally sanctioned, and some of the provisions of the Mutiny Act were extended to troops abroad.

The discipline of the army in any part of Her Majesty's dominions both at home and abroad was now regulated partly by the statutory Act and partly by Articles sanctioned by it, but the royal prerogative as to making Articles for an army on active service in a foreign country still remained.

In 1803 the great change was made of extending the Mutiny Act and the statutory Articles to the army both at home and abroad, whether within or without the dominions of the Crown. There was no longer a necessity for the Crown to exercise its prerogative, and the army became governed under all circumstances by statute law, and by regulations issued by the Crown in accordance with it.

6. ORIGIN OF THE MUTINY ACT.—Reference must now be made to the statutory Act. The attempts made by the Crown to enforce military law in time of peace—notably by Charles I.—led to constant conflicts between Parliament and the King.

The necessity of having a legal military code did not, however, become very apparent until a standing army was sanctioned in 1660.

The growth in power and numbers of this force was viewed with some apprehension by Parliament, and articles for its government were tolerated rather than sanctioned.

Punishments amounting to loss of life or limb were prohibited, and the state of discipline became very lax.

A bill for the better regulation of the discipline of the army was introduced in 1689, and its passage through Parliament was somewhat hurried by reason of the mutiny of some Scotch regiments at Ipswich who had been ordered to Holland but, refusing to go, had marched northwards, declaring that James II. was their rightful king.

The duration of the Mutiny Act thus made was limited to seven months, but with few intermissions it has since been passed annually up to 1878.

The Mutiny Act as originally passed only applied to England and Wales. Its power was gradually extended over Ireland in 1702, Scotland in 1707, the Colonies in 1718, and to the army irrespective of place in 1803.

In conjunction with the Mutiny Act the army was ruled for many years by the Articles of War issued under royal prerogative, and, as has been above shown, the royal prerogative was gradually encroached upon, and finally replaced by a statutory power in accordance with the Act in 1803.

The inconvenience of having a military code contained partly in a statutory Act and partly in Articles derived from that Act led finally to a consolidation of the two in the Army Discipline Act of 1879, which two years 17

later was repealed, and with some amendments re-enacted in the Army Act of 1881.

7. ORIGIN OF COURTS-MARTIAL.—The administration of the military code in the first instance under Articles of War, and subsequently under both the Mutiny Act and Articles of War, was carried out by means of military courts. The first of these appears to have been the 'curia militaris,' or court of chivalry, which was part of the Aula Regia, or supreme court of great officers of State, established by William the Conqueror.

The Court of Chivalry consisted of the Lord High Constable, who was the King's general and commander-in-chief, and the Earl Marshal, whose duty it was to marshal the army, and ascertain that all persons liable to serve fulfilled their liabilities.

'To the constable it appertaineth to have cognizance of all contracts and deeds of arms, and of our war out of the realm, and also of things that touch war within the realm which cannot be determined by common law.

'All appeals of things done within the realm shall be tried and determined by the good laws of the realm made and used in the time of the King's noble progenitors, and all appeals to be made of things done out of the realm shall be tried and determined before the constable and marshal of England for the time being.'[1]

In time of war the court of the constable, as it was usually called, followed the army, and punished summarily according to the Articles of War for the time being in force.

It is evident that a single court was incapable of dealing with troops acting in different places, and additional constables and marshals were delegated by commission from the Crown to form other courts when required.

The office of High Constable was abolished in the reign

[1] 1 Hen. IV. c. 14. 13 Rich. II. c. 2. An interesting account of the rise of military law is to be found in *Adye on Courts-Martial.*

of Henry VIII., and with it lapsed all the criminal jurisdiction of the Court of Chivalry. With the concurrence of the judges of the common law, the marshal occasionally held a court himself on purely civil matters, but the jurisdiction and power of punishment of the court was so limited that, although never legally abolished, it became extinct.

From the death of the last hereditary High Constable up to the recognition of military courts by statute in 1689 military law was administered by means of commissioners, by the general in command of the troops sitting himself as marshal, or by means of deputies which he was authorised to appoint.

The commissioners or deputies were usually officers of the army, and at the beginning of the great civil rebellion habitually formed courts or councils of war, in accordance with the then existing Continental military jurisprudence.

These councils of war some few years prior to the passing of the Mutiny Act were called courts-martial,[1] and with slight modifications as to constitution and power are the existing military courts.

[1] The true derivation of the word 'martial' opens out an interesting field of inquiry. Simmons and others hold that courts-martial derive their name from the Court of the Marshal, but there is a good deal to be said against this view, as the words martial and military are in some of the old records synonymous.

CHAPTER II.

THE MILITARY CODE, AND PERSONS SUBJECT TO IT.

8. ARMY ANNUAL ACT. 9. ARMY ACT OF 1881—Its Contents. 10. ARTICLES OF WAR—Indian Articles of War. 11. RULES OF PROCEDURE. 12. QUEEN'S REGULATIONS. 13. GENERAL ORDERS. 14. ARMY CIRCULARS. 15. ROYAL WARRANTS. 16. ORDERS IN COUNCIL. 17. OTHER ACTS—Army Discipline Act—Regulation of Forces Act—Reserve Act—Militia Act. 18. PERSONS SUBJECT TO MILITARY LAW—Reserve and Auxiliary Forces—Indian and Colonial Forces—Civilians.

THE Army Act of 1881 has of itself no force unless it be kept in operation by an annual Act passed by Parliament at the commencement of each financial year.

8. THE ARMY ANNUAL ACT is passed each year (usually in April), for the purpose of providing for the continuance in force of the Army Act of 1881 for a further period of twelve months. The operation of the Act is extended to the following dates in the subsequent year:

In the United Kingdom to April 30.

In Europe, the West Indies, and America to July 31.

Elsewhere to December 31.

The annual Act states in its preamble that it is illegal 281
to keep up a standing army within the realm without consent of Parliament, declares the necessity of having a military code, enumerates the numbers of the Army, and brings in force any amendment to the Army Act of 1881 that may be deemed necessary.

9. THE ARMY ACT OF 1881 is divided into five parts, viz.—

(1) *Discipline.*—This part deals with the various military crimes and their maximum punishment, authorises the formation of military courts, and legislates for the carrying out of the sentences awarded by them. It also gives the Sovereign power to make Articles of War and Rules of Procedure in accordance with the provisions of the Act.

(2) *Enlistment.*—The law is laid down as to the terms upon which a man enlists and reckons service, arranges for his transfer, re-engagement, prolongation of service, and discharge, and deals with those special provisions in regard to enlistment in which both soldiers and civilians are concerned.

(3) *Billeting and Impressment of Carriages.*—This portion of the Act only comes in force when troops are on the move in the United Kingdom, and arrangements have to be made through the medium of the police with the civil population in order to provide food for the soldier, and carriage for his effects.

(4) *General provisions*, which refer to details connected with the military courts and their jurisdiction, military prisons, the pay of the soldier, the adjustment of civil and military law, and the power to deal summarily by civil process with certain offences.

(5) *Application of the Act.*—Definitions are given of the various terms used in the Act, and its jurisdiction is pointed out with reference both to persons and places.

10. ARTICLES OF WAR. — The Sovereign has still the power to make Articles of War, but no crime specified in the Act can be punished otherwise than in accordance with its provisions, nor can any crime not mentioned in the Act be punished by death or penal servitude. Owing to the completeness of the present military code it is doubtful if articles will ever again be necessary, but it S. 69 5

should be noted that if they are they would apply only to soldiers, while the Army Act as it stands applies both to soldiers and civilians.

The Indian Articles of War are embodied in an Act of the local legislature, and affect all officers and soldiers who are natives of India (whether they be attached to European troops or not), all natives of India who follow an army on active service, and generally all persons belonging to the Indian army, subject to the limitations that— S. 175, S. 176, S. 180 S. 177

(1) European officers and persons of British birth are only subject to the Army Act.

(2) An offender, if not a native of India, must be tried by a court consisting of European officers only. 18

The power of the Admiralty to make *Articles of War* for the government of marines is distinctly recognised. S. 179

11. THE RULES OF PROCEDURE made in accordance with the Act deal with all the details connected with the formation of military courts, the trial of offenders, and the carrying into effect of sentences. S. 70

In addition to the regulations made by authority of the Army Act there are certain other authorities binding on officers and soldiers which deal with minor matters.

12. THE QUEEN'S REGULATIONS lay down most of the details as to the interior economy of corps, give general instructions as to the maintenance of discipline, define clearly the power and duties of commanding officers, and supplement the provisions of the Army Act as to offences against enlistment and the disposal of prisoners.

13. GENERAL ORDERS are issued by the Commander-in-Chief as the representative of the Crown, and deal with questions of duty, discipline, and general efficiency.

14. ARMY CIRCULARS are issued by the Secretary of State for War as the representative of Parliament, and deal with all matters connected with an expenditure of money.

15. ROYAL WARRANTS are published from time to time, as occasion necessitates, by the Crown with the advice of the Secretary of State for War, and refer to matters beyond the province of a General Order or Army Circular.

16. ORDERS IN COUNCIL are the regulations laid down by the Crown with the advice of the Privy Council. In matters of discipline they are only issued to meet those cases which affect simultaneously both the land and naval forces. (Vide Q.R. xvii. 73.)

17. OTHER PARLIAMENTARY ACTS.—The following Parliamentary Acts are also at present in force, and affect persons therein referred to :

(1) *The Army Discipline and Regulation (commencement) Act of* 1879 consists of a few unrepealed clauses which provide that references to the old Mutiny Act, and acts done by it, and sentences passed by it, shall be deemed to hold good, as if they had been passed by the existing Army Act.

(2) *The Regulation of the Forces Act*, 1881, contains clauses as yet unrepealed as to volunteers, regimental debts, pensions of the Indian forces, &c.

(3) *The Reserve Forces Act*, 1882, *and the Militia Act*, 1882, have been passed with a view of consolidating the existing law as to these forces, and came into action on January 1, 1883.

18. PERSONS SUBJECT TO MILITARY LAW.—The following is a brief summary of the persons subject to the Army Act and under military law.

British Forces.—All officers and soldiers on the active list. S. 175

Officers on half-pay or on the Reserve list, or who from any cause are not on the active list, are not subject but come under the law if employed on military service under regular officers who are subject to military law. S. 175

Army Reserve (Cl. 1 and 2) when called out either temporarily or permanently. S. 176

Pensioners when employed in military service under an officer of the regular forces.

Militia Reserve, when called out either temporarily or permanently.

Marines.—Officers and soldiers when not subject to the Naval Discipline Act. S. 179

Militia.—Officers and permanent staff always. Soldiers when embodied, out for training, or attached to regulars. S. 175 S. 176

Yeomanry.—Permanent staff always. Officers and soldiers when on actual military service, out for training, attached to regulars, or serving in aid of the civil power.

Volunteers.—Permanent staff always. Officers and soldiers when on actual military service, out for training with regulars or militia, or attached to regulars.

(When not called out for actual military service, a volunteer who is about to become subject to military law should be warned and given an opportunity of evading the liability.)

Indian Forces.—European officers and British born subjects. S. 180

All other persons attached to the Indian army, and all officers, soldiers, and others, who are natives of India, are subject to the Indian military law, but a court for their trial can be convened under this Act. S. 190

10

Colonial Forces.—Colonial troops raised at the imperial expense and under an officer of the Regular forces. S. 175 S. 176 S. 177

Troops which are wholly the property of a colony, and are entirely maintained by it, are subject to the Act only when serving with regular forces, and then only to the extent of supplementing any deficiencies of the colonial law.

Civilians.—All persons attached to or accompanying a force on active service, either in an official capacity or as a camp follower. S. 175 S. 176 S. 180 S. 184

(Natives of India remain subject to the usages of Indian military law.)

It should be remembered that the Army Act is part of the statute law, and that all persons, irrespective of their being subject to military law, are bound to obey those provisions of it which are applicable to them: for instance, policemen are liable with regard to billeting and impressment of carriage, innkeepers with regard to billeting, and all persons in reference to certain offences relating to desertion, enlistment, purchasing regimental necessaries, &c.

CHAPTER III.

MILITARY CUSTODY.

19. MILITARY CUSTODY—Offences against—No Duty while in—Trial of Persons taken into—Informal Custody—Detention in Custody—Ordering into Custody. 20. CLOSE AND OPEN ARREST. 21. ORDERING ARREST OF OFFICER. 22. REPORT OF ARREST. 23. REFUSAL OR APPEAL. 24. RELEASE FROM ARREST. 25. ARREST OF NON-COMMISSIONED OFFICERS. 26. ARREST OF WARRANT OFFICERS. 27. PRIVILEGE FROM ARREST. 28. WRONGFUL ARREST. 29. CONFINEMENT—The Gaoler—On the March—Treatment of Minor Offences—When Crime is Confessed. 30. FORWARDING THE CRIME. 31. REPORT OF COMMITTAL—Non-Delivery of Crime. 32. RELEASE FROM CONFINEMENT.

19. MILITARY CUSTODY.—Whenever a person subject to military law commits an offence, steps should be taken to have the matter investigated without delay. If the offence is of a serious character, or if the circumstances of the case render it advisable, the person charged is taken into *military custody*, *i.e.* placed in arrest or confinement. S. 45 **33**

Offences against. — The unnecessary detention of a prisoner in arrest or confinement is an offence against military law, and any prisoner who resists against, escapes, or attempts to escape from lawful custody can be severely punished. S. 21 S. 10 S. 22

No Duty while in.—An offender while in custody is not to be required to perform any military duty further than may be necessary to relieve him from the charge of any cash, stores, or accounts for which he may be respon- Q. vi 31

sible. He is not to be permitted to bear arms except on the line of march or in cases of emergency. If either from error or unavoidable circumstances he is put on duty, he is not thereby absolved from liability to be proceeded against for his offence.

Trial of Persons taken into.—All persons subject to military law who commit an offence can be taken into military custody and can be tried, provided that the offence charged was not committed more than three years before the prisoner is arraigned, except in the case of mutiny, desertion, and fraudulent enlistment. S. 161 58 155 161 174

A person who commits an offence while subject to military law and then ceases to be subject to it may be taken into custody, and tried after ceasing to be subject— S. 158

(1) *At any time* for the offences of mutiny, desertion, and fraudulent enlistment.

(2) *Within three months* after he has ceased to be subject for other offences.

Men belonging to the Reserve and the Militia who commit certain offences cognisable by both a military and civil court under the provisions of the Militia Act and the Reserve Force Act, can be taken into military custody irrespective of whether they be at the time subject to military law or not, and can be tried within two months after the offence has become known, or if the prisoner cannot then be apprehended, within two months after his apprehension. R.F.A. 6, 15, 26 M.A. 10, 23, 26, 43 58

Informal Custody.—When a prisoner may be legally apprehended and detained in custody no technical informality in the order which detains him shall cause his release, and any irregularity in the order of detention may subsequently be amended. S. 172

Detention in Custody.—A person in custody must have his case investigated within 48 hours, and if he is detained (not on active service) for more than 8 days without a court-martial being ordered to assemble, a special report must be made by his commanding officer to the General in command, and a similar report must be S. 45 R. 1 R. 2 Q. vi 17

furnished weekly till either the prisoner is released or a court is assembled for his trial.

Ordering into. — A person is usually ordered into military custody by an officer or non-commissioned officer of superior military rank, but provost-marshals (who can only be appointed abroad) have the power to arrest and detain any persons subject to military law who are committing an offence. S. 74

Naval officers in command of her Majesty's ships can order any officer or soldier to be put in arrest or confined, for committing an offence against the good order and discipline of the ships. Q. xvii 73

Officers and non-commissioned officers are as a rule put in *arrest*, but if the circumstances of the case require it they may be placed under the charge of a sentry, guard, or provost-marshal. Q. vi 18

Peers and Members of Parliament are not privileged from arrest. Sm. 68

20. CLOSE AND OPEN ARRESTS. — Arrest may be either *close* or *open*, at the discretion of the authority who orders it. An officer in close arrest is not allowed to leave his tent or quarters. When in open arrest he may take exercise at stated periods within defined limits, but must not appear in any place of public resort. An officer in arrest must always wear uniform, but without sword, sash, or belts. Q. vi 19, 20

21. ORDERING ARRESTS OF OFFICERS.—An officer can place in arrest any other officer of inferior rank, but no officer can order the arrest of an officer or non-commissioned officer, or confine a soldier, if an officer of a rank senior to himself is present. S. 45

When occasion necessitates an officer being placed without delay under arrest, the senior officer present, if he be of a rank higher than the offender, should order it.

In the exceptional case of a 'quarrel, fray, or disorder,' a junior officer may order the arrest of a senior who is engaged in the disturbance. S. 10 S. 45

When immediate action is not necessary the commanding officer should inquire into the circumstances of the case, and not place an officer under arrest until he has satisfied himself that the matter must be proceeded with. If necessary, the adjutant or one of the acting regimental staff is then ordered to place the offender in arrest. Q. vi 22

If action be taken by an officer of superior rank the services of a staff officer should be employed to give the actual order of arrest, or the commanding officer may be directed to take the proper steps.

An officer placed in arrest is usually asked for his sword. Sm. 353

22. REPORT OF ARREST.—When an officer is placed under arrest the commanding officer is directed to report the case without delay to the officer commanding the district or station. It is necessary, therefore, that an officer who places another in arrest should invariably report at once the fact of his having done so to the commanding officer of the offender, or to the General in command direct if the circumstances of the case render it advisable. Q. vi 22

23. REFUSAL OR APPEAL.—An officer cannot decline to go under arrest when ordered by one senior to himself, nor can he refuse to obey the order of a junior in the case of a 'fray.' S. 10 S. 15

An officer under arrest cannot demand a court-martial, nor can he decline to be released by proper authority or refuse to return to duty. Q. vi 23

24. RELEASE FROM ARREST.—Unless an arrest has been made in error, an officer should not, as a rule, be Q. vi 21

released without the sanction of the highest authority to whom the case may have been referred.

25. ARREST OF N.-C. OFFICERS.—The restrictions as to close and open arrest apply to non-commissioned officers. If a non-commissioned officer is charged with a serious offence he is placed under arrest by the senior officer on the spot. In case of doubt, the arrest may be delayed, and if the offence is not of a serious nature it may be disposed of without previous arrest. Q. vi 24

A non-commissioned officer can be placed in arrest by another non-commissioned officer.

26. ARREST OF WARRANT OFFICERS.—A warrant officer holding an honorary commission ranks as an officer, and is similarly dealt with. All other warrant officers are treated as non-commissioned officers. S. 190 S. 182

27. PRIVILEGE FROM ARREST.—An officer or non-commissioned officer is privileged from arrest, and no person can be detained, if ordered or summoned to give evidence before a court-martial or a superior civil court. S. 125 229

28 WRONGFUL ARREST.—If an officer thinks that he has been wrongfully put in arrest, or is otherwise aggrieved, and does not obtain redress from his commanding officer, he can appeal to the Commander-in-Chief. 278 S. 42

Whether a civil action would lie against a superior who maliciously and without proper cause orders the arrest of a subordinate is a matter that has never been clearly decided.

29. CONFINEMENT.—A soldier charged with a serious offence is, by order of an officer or non-commissioned S. 45 Q. vi 25

officer, *confined* in the guard-room, prisoners' room, or guard-room cells, or placed in charge of a guard, sentry, or provost-marshal. The cells are, when available, reserved for cases of riot and drunkenness, when it is desirable that the prisoner should be kept alone.

The Gaoler.—A commander of a guard or provost-marshal cannot refuse to take charge of a prisoner handed over to him for safe custody, and is bound not to improperly release such prisoner or allow him to escape. S. 45 S. 20

On the March.—When troops are on the line of march, or when from any cause there is a lack of accommodation for the detention of prisoners, a soldier may be committed by order of his commanding officer to any prison or lock-up for a period not exceeding seven days. Q. vi 25 S. 132

Treatment of Minor Offences.—Where minor irregularities are committed, such as being absent for a short period, overstaying pass, &c., the charge may be investigated and disposed of without confining the offender. Q. vi 25

When Crime is confessed.—If a soldier makes a confession of desertion, or of having committed some offence against the laws of enlistment, and proof is not at once forthcoming, he may be allowed to continue at duty pending inquiry. Q. vi 28

30. FORWARDING THE 'CRIME.'—The officer or non-commissioned officer who orders a soldier to be confined should deliver to the official into whose custody he is committed an account in writing signed by himself of the offence with which he charges the prisoner. This account or 'crime' should be short, and contain all the material points connected with the accusation made. If the 'crime' is not delivered at the time of committal, a verbal report to the same effect is to be made. It should always be sent in as soon as possible, and its delivery should never be delayed beyond twenty-four hours. S. 45 S. 21

31. REPORT OF COMMITTAL.—The officer or non-commissioned officer who is in charge of the guard must enter in the guard report or in a special report the name and offence of the prisoner, and the name of the person committing him. This report, together with the original crime, must be sent in to the officer in command through the usual channel when the guard is relieved, and in any case within twenty-four hours. S. 21 S. 45 Q. vi 16

Non-delivery of Crime. — The non-delivery of a 'crime' should be noted in the guard report or special report, and if it be not delivered within twenty-four hours, a further special report must be made by the person who is in charge of the guard at the time.

If no evidence is forthcoming to justify the detention of the prisoner, the officer to whom the guard reports are furnished should, after the expiration of forty-eight hours from the time of committal, release him.

32. RELEASE FROM CONFINEMENT.—A soldier when confined can only be released by proper authority. If all the circumstances connected with the offence are purely regimental, and the prisoner is confined in the regimental guard, he can be released by order of his commanding officer.

If the prisoner has been sent to a garrison guard, or been temporarily entrusted for safe keeping to a regimental guard, permission for his release must be obtained from garrison head-quarters.

CHAPTER IV.

INVESTIGATION OF CHARGES.

33. INVESTIGATION. 34. CHARGE AGAINST AN OFFICER. 35. CHARGE AGAINST A WARRANT AND NON-COMMISSIONED OFFICER. 36. CHARGE AGAINST A SOLDIER—Evidence—Summary of Evidence. 37. DISPOSAL OF OFFENCE—Summary Disposal—Application for Court-Martial.

33. INVESTIGATION.—An officer or soldier who has been taken into military custody must have his case investigated without delay, and at all events within forty-eight hours after committal (exclusive of Sundays, Good Friday, and Christmas Day), or the reason must be reported to the general in command. S. 21 S. 45 R. 2 R. 134 19

34. CHARGE AGAINST AN OFFICER.—Charges against an officer may be investigated either before or after he is placed in arrest, according to circumstances. The case is either examined into privately by a competent military authority or formally investigated by the commanding officer, or a court of inquiry is ordered to assemble. 214 S. 45 R. 128 273

An officer who is charged with an offence under the Army Act can demand to be present at the investigation. The evidence must then be taken down in writing, and the officer accused allowed to cross-examine the witnesses, and make any statement or call any witnesses in his defence. R. 8 R. 3 R. 5

When investigation takes place in the absence of the R. 8

officer charged with the offence, an abstract of the evidence to be adduced is to be delivered to him not less than twenty-four hours before trial.

The commanding officer of the accused is responsible that the investigation is commenced within forty-eight hours (or a special report made), and that the case is either dismissed or referred to a superior, or that an application is made for a general court-martial through the usual channel. R. 2 R. 4

An officer whose character or conduct has been publicly impugned is bound to submit the case to his commanding officer or other competent military authority for investigation. Q. vi 41

35. CHARGE AGAINST A WARRANT AND NON-COMMISSIONED OFFICER.—A warrant officer cannot be punished by a commanding officer, and the charge against him must either be dismissed or the case sent for trial by a district or general court-martial. When the accused is remanded for trial, a summary of evidence must be taken for the purpose of being laid before the court. 49 214 S. 182 R. 5

When a non-commissioned officer commits a minor offence he is privately admonished by the commanding officer, and no record of the fact is kept. If the offence is more serious, his case is investigated at the orderly-room in the same manner as that of a soldier. 36

36. CHARGE AGAINST A SOLDIER—Minor irregularities committed by a soldier are disposed of by the officer commanding his troop or company. Q. vi 33

More serious offences are investigated and disposed of by the commanding officer in the orderly-room every morning, in the presence of the prisoner and the officer commanding his troop or company.

Investigation must be commenced within forty-eight hours after the committal of the prisoner to custody. In R. 2

the case of drunkenness a delay of at least twenty-four hours is advisable in order to ensure the sobriety of the prisoner when brought up. Q. vi 27

The leading facts connected with the offence charged should be shown in the 'crime' forwarded by the person who committed the prisoner. In some cases, however, additional incidents may be brought out in evidence in the orderly-room. The commanding officer should not, *as a rule*, make these additional facts the cause of new charges being made against the prisoner, although he has the power to do so. 30 214

Evidence. — The accused is allowed full liberty to cross-examine any witness against him, and to call any witnesses or make any statement in his defence. If the offence charged is absence without leave over seven days, the prisoner may demand that the evidence be taken on oath. R. 3. S. 46 40

When the commanding officer is of opinion that he cannot deal with the case himself, but that he must make an application for a general or district court-martial, the evidence of each witness is taken down in writing in a narrative form, read over to him, and attested by his signature. 78 R. 5

The summary of evidence thus taken should include any statement the prisoner may like to make in his defence. He cannot be made to sign his statement, but *should be warned* that it may be used in evidence against him.

Under ordinary circumstances evidence against a prisoner will at first be given verbally. If subsequently, for the purposes of remand, the evidence is taken down in writing, there may result some discrepancies, and any questions of the prisoner, together with their answers, in reference to such variations should be appended to the statement of the witness concerned.

Again, the taking down of the evidence in writing may throw a new light on the case, and enable the commanding officer to reconsider his decision as to the necessity of remanding the offender. R. 5

The summary of evidence is forwarded with the application for the court-martial to the proper military authority.

The summary of evidence may in cases of emergency be dispensed with, and is not taken when a prisoner is to be tried by field general or summary courts-martial. R. 102 104

37 DISPOSAL OF OFFENCE.—The commanding officer, after hearing the evidence and taking into consideration the nature of the offence, the character and disposition of the prisoner, and the attendant circumstances, proceeds to either—

(*a*) *Dismiss the case.*—When, from want of jurisdiction, insufficiency of evidence, or any other cause a case is dismissed, no record is kept of the proceedings, and they are null and void. R. 4 S. 46

(*b*) *Summarily dispose of the case.*—The power of a commanding officer to deal summarily with an offence is restricted by the Queen's Regulations. In cases of emergency he may exceed his power of jurisdiction, but must report at once his reasons for so doing. Q. vi 35 39

(*c*) *Order a regimental court-martial to assemble.*—A regimental court-martial is essentially the court of the commanding officer. It should as a rule only try the offences which can be dealt with summarily, and is used when a more severe punishment than the commanding officer can personally inflict is necessary. It must not be forgotten, however, that the jurisdiction of courts-martial in respect of the trial of offences is unrestricted, and that a regimental court can, in cases of emergency, and when specially ordered by a superior officer, try the more serious offences. The court-martial should be assembled within thirty-six hours, but in no case before eighteen hours. R. 16 39 Q. vi 62, 63 R. 4 R. 14

(*d*) *Apply to a superior for a general or district court-martial.*—Application is made to a superior (within thirty-six hours) when the offence is beyond the jurisdic- 78 R. 4

tion of a commanding officer, and when a punishment more severe than can be inflicted by a regimental court-martial is, from the circumstances of the case, desirable. If a commanding officer in a case of emergency punishes an offence which is beyond his powers to ordinarily deal with, he must report his action and give his reasons for the course pursued. R. 17 Q. vi 85

CHAPTER V.

POWERS OF COMMANDING OFFICER.

38. The Commanding Officer. 39. His Jurisdiction. 40. Imprisonment up to Twenty-one Days. 41. Imprisonment up to 168 Hours. 42. Fines for Drunkenness—Definitions—Drunk off Duty—Punishment—Recording Offence—Combined Offences. 43. Deprivation of Pay. 44. Confinement to Barracks. 45. Admonition. 46. Stoppages. 47. Combined Punishments. 48. Punishments of Non-commissioned Officers—No minor Punishments—Resignation of Rank. 49. Warrant Officers. 50. Awarding Punishment—Absence without leave. 51. Appeal to Court-martial. 52. Summary *v.* Regular Trial. 53. Power of Company Officers. 54. Officers on Detachment.

38. THE COMMANDING OFFICER.—A commanding officer, in the ordinary sense of the word, means an officer whose duty it is, in accordance with the usual custom of the service, to deal with offences and either dispose of them on his own authority or refer the cases to superior authority. R. 128 Q. vi 12

In some portions of the Act the term commanding officer has a wider meaning, and refers to an officer of superior rank who holds a position of command.

39. HIS JURISDICTION.—Under the Army Act any commanding officer or any court-martial can try any offence, but a limitation is placed on the punishments which each Q. vi 61

tribunal can award. It is not intended, however, that serious offences should be dealt with summarily or by the minor courts, and hence restrictions are placed in the way of the commanding officer trying the more serious offences unless he obtains the sanction of a superior authority.

The following offences mentioned in the Act can be summarily punished by the commanding officer, or be punished by a regimental court-martial convened by him, without reference to superior authority :— Q. vi 35

1. Resisting against lawful custody or escort. S. 10
2. Breaking out of barracks.
3. Neglect of standing orders. S. 11
4. Absence without leave under twenty-one days, or from parade, school, or bounds. S. 15 178
5. Drunkenness (except sentry on post). S. 19
6. Loss by neglect or making away with arms, ammunition, clothing, equipment or necessaries, or making away with military decorations. S. 24 189
7. Ill-treating or making away with a Government horse.
8. Wilfully injuring public or soldiers' property.
9. Conduct to the prejudice of good order and military discipline. (Under this heading would fall the majority of the minor military and civil offences committed by a soldier.) 191 S. 40

A commanding officer, when dealing summarily with an offence committed by a soldier, may award the following punishments :—

40. IMPRISONMENT UP TO TWENTY-ONE DAYS (with or without hard labour) for the offence of absence without leave; but the number of days' imprisonment awarded, if it exceed seven, must not be more than the number of days of absence. Q. vi 42 36 178

Imprisonment up to seven days must be awarded in hours (168); beyond seven days, in days.

When a sentence exceeds seven days, no minor punishment should be added for *the offence of absence.* This

does not, however, prevent an additional minor punishment being given for *another offence* (such as damage to property) with which the offender is charged.

Ex. A man may be charged with absence for ten days. For this offence he may receive any number of hours' imprisonment up to 168 hours, or he may be given ten days' imprisonment. If he returns drunk he may in addition be fined for the drunkenness according to scale.

41. IMPRISONMENT UP TO 168 HOURS (seven days).— Imprisonment is generally reserved for serious offences or repeated acts of the same offence. S. 46 Q. vi 42

The term of imprisonment, when awarded in days, begins on the day of award; when in hours, at the hour at which the prisoner is received into prison, or, if the prisoner cannot be sooner received, not later than twenty-four hours after the usual hour of committal on the day of the award. **128** R. 6

42. FINES FOR DRUNKENNESS NOT EXCEEDING TEN SHILLINGS.—The amount of fine and method of computing it is prescribed by a scale which is hung up in all barrack-rooms, and is dependent on the circumstances of the case. No discretion in altering the fine is allowed, but a soldier if fined can appeal to have his case tried by court-martial instead of submitting to the fine. Q. vi 56 S. 46 R. 7 **51**

Definition.—Drunkenness is either 'simple' or 'aggravated.' Simple drunkenness is an act of drunkenness committed by a soldier when not on duty, nor warned for duty, nor called upon to do duty. *Aggravated drunkenness* comprises all cases of drunkenness committed by a soldier when *on duty*, or after being warned for duty, or when, by reason of his drunkenness, he is found unfit for duty. Drunkenness *on duty* includes drunkenness on parade and on the line of march. **184** **186** Q. vi 52 S. 44 Q. vi 54

Drunk off duty.—Drunkenness not on duty *must* be punished summarily by a commanding officer if there

are not more than three previous cases of drunkenness in the preceding twelve months. S. 46

For the fifth and from the fifth to the eighth offence in any one year it is optional with the commanding officer either to dispose of the case summarily or try it by court-martial.

The ninth and subsequent offences in any one year *should* be tried. If, however, within the twelve months a soldier has already been convicted by court-martial of simple drunkenness (unaccompanied by any other offence), the sending him for trial again is left to the discretion of the commanding officer. Q. vi 52

Punishment.—A commanding officer must always impose a fine for drunkenness when the soldier is liable thereto. Imprisonment and confinement to barracks can in some cases be added. When the amount of unpaid fines amounts to 1*l.*, imprisonment or other punishment should be substituted for fine. Q. vi 55, 57 47

Recording offence.—When a soldier is charged with absence, and it is the opinion of the commanding officer that the absence was due to drunkenness, discretionary power is given to mark the entry in the defaulter's book with a D., which can be reckoned as an instance of drunkenness for the purpose of computing a future fine, but not to determine liability for trial. All entries of drunkenness are counted, whether the offence has been disposed of summarily or by court-martial. The twelve months are reckoned without any deduction as to absence or forfeited service. Q. vi 53 48 Q. vi 52

Combined offences. — Where simple drunkenness is combined with a more serious offence for which an offender is to be tried, the drunkenness is disposed of summarily either by fine or by a recorded entry of 'no punishment, awaiting trial on another charge.' Q. vi 55

If, however, a soldier is *liable* to trial for drunkenness, and the commanding officer thinks fit, he can be charged with the drunkenness before the court-martial.

An offence of *drunkenness on duty* (whether it be a

first or subsequent offence) can either be dealt with summarily or sent for trial to court-martial. S. 19, 46

43. DEPRIVATION OF PAY UP TO FIVE DAYS FOR ABSENCE WITHOUT LEAVE.—For the purpose of deprivation of pay *one day* consists of six consecutive hours, which may be either wholly in one day or partly in one and partly in another. Any less period than six hours constitutes a single day when the two conditions are fulfilled that— P.W. 766 S. 140 40 178

(*a*) The absentee was prevented performing some military duty.

(*b*) That the duty was thrown on some other person.

In calculating the number of days' pay of which a man can be deprived, it is easiest first to consider an ordinary case of absence and act on the following data :—

(1) *One* day's absence, whether wholly in one day or partly in one and partly in another, is six hours for fining purposes. Two days is twelve hours ; three days, eighteen hours, and so on. P.W. 766 (a) P.W. 766 (b)

(2) A day not for the purpose of fining consists of twenty-four hours, and commences after 12 P.M., or is an ordinary day of the week.

(3) The number of days' pay of which a man is deprived must not exceed the number of days of the week during the whole or portion of which he was absent. 766 (b)

For example, a soldier absent from 10 P.M. on Monday to 11 A.M. on Tuesday is liable to be deprived of two days' pay, but if absent from 9 A.M. on Monday till 12 P.M. he is only liable to lose one day's pay.

A man absent from 11.45 P.M. on Monday till 12.15 A.M. on Wednesday can be fined three days' pay, because the absence exceeds the three days (for fining purposes) of eighteen hours, and comes under the other limit that the number of days' pay deprived must not exceed the number of days of the week the man is absent.

The second case must now be considered which arises

when a man's absence prevented his fulfilling some military duty which was thrown on another person. Under these circumstances *one* day is any period or part, however short, of an ordinary week-day for fining purposes; *two* days is any such period with six hours added to it. P.W. 766 (a)

The exceptional rule does not apply in practice in the case of more than two days.

The other data are as before. For example, a man is absent from duty at 6 P.M. on Monday. If he returns at any time up to midnight he can be fined *one* day's pay, but if he does not come back till 12.30 A.M. on Tuesday he can be fined *two* days' pay, though he may really only have been six hours and a half absent.

Again, a man absent from duty from 4 to 5 P.M. on Monday can be deprived *one* day's pay, and a man absent from 11 P.M. on Monday and returning at 6 A.M. on Tuesday under similar circumstances can be deprived *two* days' pay.

Before depriving a man of pay in this exceptional case care must be taken that *both* the conditions *a* and *b* are fulfilled.

In the event of absence exceeding five days no award of deprivation is made, as the pay is necessarily forfeited as a consequence of such absence. P.W. 766

44. CONFINEMENT TO BARRACKS UP TO TWENTY-EIGHT DAYS.—This punishment carries with it punishment drill up to fourteen days in addition to all regular duties and fatigues. Q. vi 42

45. ADMONITION.—A commanding officer can also simply admonish an offender; but the fact of an admonition being given must, together with the offence committed, be recorded against him in the company's defaulter book. Q. vi 1 Q. xxii 85

46. STOPPAGE OF PAY.—Stoppages may be awarded to make good any loss, damage, or destruction done to any S. 138

arms, ammunition, kit, or other property, and for the purpose of deducting a penny a day up to twenty-eight days for liquor ration stopped on board ship.

47. COMBINED PUNISHMENTS.—A single award of imprisonment, combined with confinement to barracks, must not exceed twenty-eight days. Q. vi 42

A soldier undergoing imprisonment or confinement to barracks may for a fresh offence be awarded additional punishment, provided that no sentence of imprisonment (except for absence) shall be for more than seven consecutive days, and that the total consecutive punishment of imprisonment and confinement to barracks shall not exceed fifty-six days. **40**

Confinement to barracks should only be added to a fine when the nature of the case of drunkenness is such as to demand an exceptional punishment. Q. vi 57

Imprisonment must not be combined with fine except when the offence of drunkenness charged is liable to trial by court-martial. **42**

48 PUNISHMENT OF NON-COMMISSIONED OFFICERS.—If a non-commissioned officer is simply admonished or reproved, it should not be done in the hearing of the men, and no record of it is kept. A non-commissioned officer is in a position of trust, and if he shows himself unworthy of it by committing a serious offence, he should be brought before a court-martial in order that his responsibilities may be taken from him. For minor irregularities, however, a commanding officer can award the following punishments :— Q. vi 44 Q. vi 4

(*a*) *Reprimand or severe reprimand.*

(*b*) *Deprivation of acting or lance rank*, but no additional punishment is to be added. Q. vi 44 **129**

(*c*) *Deprivation of a position of the nature of an appointment*, provided that the non-commissioned officer does not hold a higher permanent grade than that of corporal. Q. vii 114

No minor punishments.—No other summary or minor punishments can be awarded, nor is a commanding officer bound to deal summarily with offences of drunkenness off duty. S. 183

Stopping leave or not recommending for promotion are not recorded as punishments.

A custom has arisen of marking a D. against the offence of a non-commissioned officer who is suspected of absenting himself when under influence of liquor. This appears illegal, as the only regulation in regard to this usage applies solely to *private soldiers.* Q. vi 53 42

Resignation of rank.—Non-commissioned officers may, with the permission of the commanding officer, resign their rank and revert to the rank or position they may have previously held, but are not allowed to do so in order to escape trial by court-martial without special sanction from the general officer in command. Q. vii 111

Report on conviction.—When a non-commissioned officer is convicted of an offence by the civil power the case is to be reported to the general officer commanding the district, with a view to obtaining the special authority of the commander-in-chief for his reduction to the ranks, if such a course should be thought necessary. Q. vi 49

49. WARRANT OFFICERS and persons subject to military law who do not belong to Her Majesty's forces cannot be punished by a commanding officer. S. 183 S. 184

50. AWARDING PUNISHMENT. — A punishment is deemed to be awarded when it is written down by the commanding officer, and, if not at once written down, when the prisoner is marched out of the immediate presence of the punishing officer.

When an award is once given it cannot be increased for the same offence, nor can the prisoner be recalled for the purpose of remanding him for a court-martial. R. 6 R. 7

In awarding punishment a commanding officer must think of the subsequent effect of his award. This will

depend mainly on whether the punishment is recorded in the regimental or company's defaulter book. 279

Absence.—In dealing with cases of absence without leave, the commanding officer must have regard to the circumstances of the absence and the manner in which the soldier came back. The absence terminates when the soldier is taken into custody, and any delay in disposing of the case must be made allowance for in awarding punishment. Cases of absence over twenty-one days cannot be punished by a commanding officer. Q. vi 47 Q. vi 36

If it appears to the general officer commanding a district or station that the summary award of a commanding officer is illegal or oppressive, he has the power of either reducing it or cancelling the award, at any time up to one year from the date of the punishment. Q. vi 50

51. APPEAL TO COURT-MARTIAL.—If a soldier is sentenced to suffer imprisonment or pay a fine, or made to suffer any deduction from his ordinary pay, or if in consequence of the summary award of his commanding officer he, by Royal Warrant or otherwise, is caused to suffer a deduction from his *ordinary pay*, he should be informed that he has a right to be tried by district court-martial instead of submitting to such punishment, and should be asked if he chooses to exercise that right. S. 46 R. 7 115 126

Ordinary pay is the usual pay of the soldier's rank, and does not include deferred pay, good conduct pay, or any military reward. S. 190 (19)

A soldier can therefore appeal if he is fined for drunkenness, but could not appeal against a summary award of eight days C.B. on the ground that he thereby was deprived of 1*d.* of G.C. pay.

A soldier, again, might be absent seven days, and be sentenced to ten days' C.B. He could not appeal on the ground that he lost seven days' pay. The pay was forfeited by Royal Warrant on account of his absence, and not on account of the award of his commanding officer.

If a commanding officer omits to ask the soldier whether he wishes to exercise his right of appeal, the

soldier may, at any time on the same day before the hour fixed for the commitment and release of prisoners, claim his right to be tried by court-martial.

If the prisoner elects to be tried by court-martial and does not demand a district court, the commanding officer may convene a regimental court for the purpose.

52. SUMMARY *v.* REGULAR TRIAL.—An offender who has been acquitted or convicted by a civil court or court-martial is not liable to be summarily dealt with for the same offence. S. 46 **61**

The fact of a magistrate having refused to deal with an offence is, however, no bar to its trial by a military tribunal. O'D. 137

A soldier who has been summarily punished is not liable to trial by court-martial for the *same offence*. This regulation does not, however, prevent trial taking place if the offence punished leads to some *other* offence of a more serious character. S. 46

For instance, a man might be summarily punished for assault, but the fact of his being so punished would not prevent his being tried for an offence of manslaughter which arose directly from the assault.

53. POWER OF COMPANY OFFICERS. — The commanding officer may at his discretion delegate to the officers commanding troops, companies, or batteries the power of awarding, for minor offences, minor punishments not exceeding seven days' confinement to barracks. Q. vi 46

54. OFFICERS ON DETACHMENT.—The commanding officer of a detachment has full powers of punishment, but this power may be restricted to any extent in the case of officers below the rank of substantive major by the commanding officer of the regiment from which the detachment is furnished, if it be serving in the same command, or otherwise by the officer commanding the garrison or station. Q. vi 13

CHAPTER VI.

JURISDICTION OF COURTS-MARTIAL.

55. COURTS-MARTIAL—Three Ordinary—Two Exceptional. 56. THEIR JURISDICTION. 57. AS TO PLACE—On board Ship—Ship in Commission. 58. AS TO TIME—Exceptional Cases. 59. AS TO OFFENCES--Civil Offences—The Courts used. 60. AS TO OFFENDERS. 61. IN CONFLICT WITH CIVIL LAW. 62. SECOND TRIALS.

55. COURTS-MARTIAL.—When an offence is of a character too serious to be disposed of summarily by a commanding officer, the prisoner charged with it is brought before a court-martial.

Three ordinary.—There are three kinds of courts-martial, which are analogous as regards their power of dealing with offences to the High Courts of the civil law, the Quarter Sessions, and the Petty Sessions. These are :—

(1) General courts-martial.
(2) District courts-martial.
(3) Regimental courts-martial.

Two exceptional.—There are besides two exceptional courts, termed field general and summary courts-martial, which can only be assembled under special circumstances, when it is impracticable to convene the ordinary courts. The jurisdiction, mode of procedure, and powers of punishment of these will be dealt with separately.

56. THEIR JURISDICTION.—Military courts are instituted in order to deal with serious offences against

military discipline committed by persons subject to the Army Act. The jurisdiction of the civil courts when they are regularly administered is only interfered with in the exceptional cases authorised by the Act.

57. AS TO PLACE.—An offence, irrespective of the place of commission, can be tried anywhere within the jurisdiction of an officer authorised to convene general courts-martial. S. 159

On board ship.—When troops are embarked on board ship they carry with them the military law that exists at the port of embarkation, and courts can be convened and offenders tried in accordance with that law. As soon as the voyage is over they come under the law that holds good at the place of landing, and the confirmation or carrying out of a sentence passed on board ship which has not already been dealt with is finished according to the provisions of that law. S. 188

Ship in commission.—Courts-martial cannot, however, be held on board ships in commission, with the exception of a regimental court for the trial of a non-commissioned officer. To meet other cases an offender must be transferred to a ship not in commission or the trial must be delayed till a landing on shore can be effected. Q. XVII 73 **137**

58. AS TO TIME.—No person can be tried for an offence if *three years* have passed since its commission, and if the offender has ceased to be subject to military law the trial must take place within *three months* of the date of his ceasing to be so subject. S. 161 S. 158 **19**

The limitation as to three months applies especially to men who are discharged or transferred to the reserve, or who constantly change their status from soldier to civilian, as in the case of the auxiliary forces.

A person who is discharged or dismissed the service **203**

and sentenced to penal servitude or imprisonment is subject to military law as long as his sentence lasts.

Exceptional cases.—The following cases are exceptional :— 155

(1) Mutiny and desertion on active service can be tried at any time. 161 174

(2) Desertion (not on active service) and fraudulent enlistment can also always be tried, unless a man has served continuously in an exemplary manner for three years since the commission of the offence. Q. vi 37

Certain offences of reserve and militia men in reference to a failure to comply with orders as to the assembly and payment of the reserve forces, desertion, fraudulent enlistment, false statements on attestation, and contravention of the enlistment laws of the militia, which can be tried both by civil and military courts, can be tried at any time within two months after the offence has become known to the officer who can dispose of it, and if the offender be not then apprehended, within two months after his apprehension. R.F.A. 26 M.A. 43 162 171 172 179

59. AS TO OFFENCES.—Courts-martial have the power to punish any military offence and any offence against the civil law which is specially mentioned in the Army Act, such as sedition, assault, theft, damage to property, and offences against enlistment and billeting, &c., subject to certain restrictions as to the power and jurisdiction of the particular court employed. 157 183 189 208

Civil offences.—They have also power to punish *any civil offence* punishable by the law of England, subject to the additional limitation that the five crimes of treason, treason-felony, murder, manslaughter, and rape can only be tried on active service, or out of Her Majesty's dominions, or at Gibraltar, or (if within Her Majesty's dominions) at any place more than 100 miles from a competent civil court. It must be remembered, however, that a competent civil court can demand as a right S. 41 192

the trial of an offender, and it is not usual to interfere with its ordinary jurisdiction.

The courts used.—Regimental courts-martial should only try the offences which can be dealt with summarily by a commanding officer, unless special permission is obtained from superior authority by the commanding officer who convenes the court. Q. vi 35 39

They can also punish a soldier for a minor *civil offence*, such as assault on a civilian, injury to private property, &c., but in all cases of trial under section 41 reference should be made to a superior. The fact of a court trying a serious offence without permission does not of itself invalidate the proceedings, but the commanding officer will, as a matter of discipline, have to explain why he took upon himself the responsibility of ordering the trial. 192

District courts-martial have sufficient power of punishment to deal with all ordinary military offences, and the higher tribunal of a general court-martial is not resorted to except in cases of a very serious nature. Q. vi 68 126

60. AS TO OFFENDERS.—Any person amenable to military law, whether he belongs to a body of troops or is simply attached to them, can be tried, subject to the restriction that district courts-martial cannot try any one holding the position of an officer, nor regimental courts any one above the rank of non-commissioned officer. S. 47 S. 48 49

Warrant officers holding honorary commissions rank as officers, and can only be tried by general court-martial. All other warrant officers can be dealt with by a district court. S. 184

Non-commissioned officers above the rank of corporal are in future not to be tried by a court lower than a district one, if such a court can be assembled. G.O. 80/84

Persons subject to military law who do not belong either to the regular or auxiliary forces, must be tried by a court other than regimental. 18

As to persons temporarily subject to the Act, see *ante*.

61. IN CONFLICT WITH CIVIL LAW.—When a soldier commits an offence against the civil law, he is, as a rule, handed over to that law to be punished. A civil court can claim to try any man who has committed a crime against civil law punishable by fine or imprisonment, and can order the removal from the army of an improperly enlisted apprentice or indentured labourer under twenty-one years of age, but cannot take a soldier out of the army on account of a fine, debt, or damage under 30*l.*, or for a breach of contract resulting from his enlistment. S. 144 S. 96 S. 97

No conviction by a military court exempts an offender from being subsequently tried by a civil court, but due regard should be paid to the amount of punishment already undergone. On the other hand, a person who has been acquitted or convicted by a civil court or court-martial, or who has been dealt with summarily by a commanding officer, cannot again be tried by court-martial or punished by a commanding officer for the same offence. S. 162 **52** S. 46 S. 157 S. 162

In the case of offences under the Militia and Reserve Force Acts which are cognisable by both civil and military law, men of the militia and reserve forces cannot be tried by civil courts (1) if they have been previously tried for the same offence by court-martial or dealt with summarily by a commanding officer; (2) in the case of a militia man, without the consent of his commanding officer or an authority superior to him; (3) in the case of a reserve man without the consent of the officer commanding the regimental district to which he is attached, or the general commanding the district in which he may be. A.C. 7/83 A.C. 34/83 A.C. 113/83 **180**

62. SECOND TRIALS.—If a court-martial be dissolved before the finding, or, in the case where the finding is guilty, before the sentence, or if the proceedings are not duly confirmed, the trial is null and void, and the prisoner can be tried again. S. 53 S. 54 R. 65 **136** **143** 143

The record of conviction is sometimes removed *after* *confirmation*, by the general of the district in the case of a regimental court-martial and by the judge-advocate general in the case of the higher courts, on the ground of illegality. If the illegality in question has reference to the procedure of the court, or the improper admission of evidence, it does not alter the fact that the prisoner has been legally convicted by a court which has proper jurisdiction, and hence he cannot be tried again for the same offence. If, however, the proceedings were annulled on account of the court not having jurisdiction (being composed of officers not competent to try the offender or the offence), the prisoner could be tried again, as the court was not legal, and hence he has really not been tried at all.

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CHAPTER VII.

COMPOSITION OF COURTS-MARTIAL.

63. Composition of Courts. 64. Qualifications of Members—Rank—Branch of Service — Disqualification. 65. Qualification of President—A Combatant Officer. 66. Duties of President—As to Charges—Evidence — Votes — Summoning Witnesses — Clearing Court. 67. Absence of President.

63. COMPOSITION OF COURTS.—Courts-martial are composed of a number of commissioned officers, the senior of whom is termed the president. To each court is assigned a legal minimum of officers, which varies according to the place where the trial is held, and each member must have a certain amount of service :— S. 47 S. 48

	G.C.M.	D.C.M.	R.C.M.
Number of members in United Kingdom, India, Malta, and Gibraltar . . .	9	5	3
Number of members elsewhere.	5	3	3
Minimum length of members' service in years . .	3	2	1

On a general court-martial five at least of the members must be not below the rank of captain. R. 21

64. QUALIFICATION OF MEMBERS.—A member must be a commissioned officer of sufficient service, as above, and be subject to military law. Members may belong to the same or different corps, and a regimental court- S. 50

martial need not necessarily be composed of officers of one regiment. General and district courts-martial should, R. 20
however, always be formed from different corps.

Officers of marines and of the Indian forces can sit on courts-martial, but officers of the navy cannot, as they are not under the Army Act.

Rank.—Members should be of equal, if not superior R. 21
rank, to the prisoner.

For the trial of a commanding officer as many members Q. vi 95
as possible should have held a similar position.

A subaltern can in no case sit on a court for the trial S. 48
of a field officer.

Branch of service.—Militia officers always, and officers S. 178
of the yeomanry and volunteers when subject to military law, can sit with officers of the regular forces to try offenders, irrespective of whether they belong to the regular or auxiliary service.

There appears no regulation against non-combatant officers sitting as members of a court provided they have the requisite amount of service, and are of a sufficient relative rank.

When trying a prisoner belonging to the auxiliary R. 20
forces at least two members should belong to those forces, and one or both to that particular branch of the auxiliary forces to which the prisoner belongs.

Disqualification.—A member must not be the con- S. 50
vening, confirming, or investigating officer, the prosecutor S. 54
or witness for the prosecution, the commanding officer of R. 19
the prisoner, a member of a court of inquiry respecting 137
the charge, or have a personal interest in the case.

65. QUALIFICATION OF PRESIDENT.—A president must, of course, be qualified as a member, but in addition he must have a rank suitable to the dignity of the court over which he presides.

The president of a general court-martial should be a Q. vi 95
general or full colonel if available, otherwise a field

officer, but in no case an officer under the rank of captain. S. 48

To a district court-martial a field officer should be appointed, but in case of emergency a subaltern can sit. Q. vi 74

The president of a regimental court-martial should not be under the rank of captain, except on the line of march, on board ship, or when a captain is, with due regard to the public service, not available. S. 47

When an officer of proper rank (captain for regimental and field officer for the higher courts) cannot be obtained, the fact must be stated in the order convening the court.

The president of a court for the trial of a warrant officer must in no case be under the rank of captain. **194** S. 182

A combatant officer.—The president of a court-martial on which any combatant officer sits as a member must be himself a combatant officer. A non-combatant officer of the proper relative rank can, however, preside over a court composed solely of non-combatant officers. Regimental courts-martial held in the army service corps afford a common example. P.W. 125

66. DUTIES OF PRESIDENT.—The president is necessarily the senior officer, and is responsible that the trial is conducted with due decorum, and in a manner befitting a court of justice. It is his duty to see that justice is administered, and that the prisoner has a fair trial and does not suffer any disadvantage through ignorance or incapacity. R. 58

All the ordinary proceedings of the court, the calling over the list of members, the reading of the orders and charges, and the questioning of witnesses, are carried out by the president. He sees that the members are seated according to rank, that the usual books and documents are before the court, and that proper inquiries are made as to the constitution of the court and the legality of the procedure. **82** **83** R. 22 R. 23

The president is the mouthpiece of the court, signs for it all necessary documents, and is the channel of communication by which its decision or opinion is made known.

When there is no judge-advocate the president performs his duties, and is the recognised adviser of the court in matters of law and procedure. 73

He administers the necessary oaths and writes the proceedings, or directs a member of the court to do so. 238

If a judge-advocate is not present, he is responsible for the accuracy of the record of the proceedings, and also for their safe custody and transmission to proper authority. R. 93 134 R. 94 R. 95

The record of the proceedings must be clearly written. If it is necessary to make any corrections they should be verified by the president's initials.

The termination of the proceedings, whether the last act be the finding or the sentence, must be signed and dated by the president. R. 44 R. 49 R. 56

As to charges.—The president has the original charge sheet and abstract of evidence sent to him before the court assembles, and if he thinks any amendment is required he should communicate with the convening officer. R. 17 80

Evidence.—During the trial he should compare the evidence given by the witnesses with the summary of evidence, and if there is any material difference should question the witnesses about it. It is not the duty of the president to supplement any defects of the prosecution, but, in order to make any matter clear which has already been sworn to, or to supplement any failings in the defence, he may (with the consent of the court) recall witnesses or call fresh witnesses at any time before the finding. R. 84 110 239

Votes.—The president collects the votes of the members, commencing with the junior in rank. He has a casting vote in all cases after the commencement of the trial (*i.e.* after the court is sworn) except *the finding.* S. 53 R. 68 116 127

In cases which may arise before the trial has commenced, such as that of challenging of members, he has no casting vote. S. 51

Summoning witnesses.—A president has the power of issuing summonses to civilian witnesses at any time after he is appointed, but it is not his duty to take the initiative in a matter of this kind before the court meets. *After the assembly* of the court, he has power to issue summonses to procure the attendance of any witnesses that may be wanted. R. 77

Clearing court.—The president can order the court to be cleared at any time for the purposes of deliberation, and no person can remain present except the judge-advocate and officers under instruction. A court can also secure secresy by retiring from the place where they are sitting and assembling elsewhere. S. 53 R. 62 82

67. ABSENCE OF PRESIDENT.—If from death, illness, disqualification, or other causes the president is absent, the court cannot proceed, and the senior member must at once report the fact to the convening officer and, if necessary, adjourn the court. The convening officer can then take steps to provide a new president or convene a new court. R. 61 R. 65 139 R. 18

Of member.—A member of a court who is absent while any part of the evidence is taken can take no further part in the trial. Provided that there is a legal minimum of officers left, the proceedings are not affected, but no officer can be added to a court-martial after the prisoner has been arraigned. If a court-martial *after the commencement of the trial* be from any cause reduced below the legal minimum, it shall be dissolved. R. 67 80 S. 53

CHAPTER VIII.

THE PROSECUTOR AND JUDGE-ADVOCATE.

68. THE PROSECUTOR—Swearing of—Absence of—Objection to—Privileges of—As Witness. 69. DUTIES OF PROSECUTOR. 70. COUNSEL AS PROSECUTOR—Civilian Prosecutor. 71. JUDGE-ADVOCATE—Qualification of—Swearing of—Absence of—Objection to—Presence in closed Court—As Witness. 72. CIVILIAN JUDGE-ADVOCATE. 73. DUTIES OF JUDGE-ADVOCATE—Summing-up—Summoning Witnesses—Examining Witnesses—Recording Proceedings—Custody and Transmission of Proceedings. 74. JUDGE-ADVOCATE GENERAL'S DEPARTMENT—Care of Proceedings.

68. THE PROSECUTOR.—On all trials an officer or non-commissioned officer who is subject to military law is appointed by the convening officer to prosecute. It is the usual custom that the prosecutor should be a commissioned officer, and in ordinary cases the adjutant of the prisoner's regiment is told off to the duty. In complicated cases and for trials by general court-martial, an officer of experience is specially selected. R. 24 120

The prosecutor must not be a member of the court nor act as judge-advocate. S. 50 71

The prosecutor appears before the court in his legal capacity when the prisoner is first brought in. He may, however, be present at the preliminary proceedings, as a court-martial is essentially an open court. R. 24

Swearing of.—The prosecutor is not sworn unless called upon to give evidence as a witness.

Absence of.—The absence of the prosecutor at any stage of the proceedings does not affect their legality.

Objection to.—The prisoner cannot object to the prosecutor, as he does not form a part of the court. R. 25

Privileges of.—In order to properly carry out his duties the prosecutor should have a copy of, or at all events access to, the charges and summary of evidence a reasonable time before the court sits.

The prosecutor is entitled to have the opinion of the judge-advocate on any point of law. R. 101

As witness.—A prosecutor should not, if possible, be called upon to give evidence for the prosecution; but if such a course is necessary, he should give his evidence before that of any other witness, and care should be taken that his sworn statement as a witness should be kept quite distinct from any statements made by him in his address as prosecutor. A prosecutor must not be allowed to swear that the matters referred to in his address are *as a whole* true. There is no objection to a prosecutor being called on as a witness for the defence. 234

69. DUTIES OF PROSECUTOR.—The duty of a prosecutor at a court-martial is somewhat peculiar.

He is bound to prove every essential part of his case by sworn evidence. At the same time he has to assist the court in the administration of justice and to behave impartially. He is an official whose duty it is to see that justice is done, and not a partisan whose object is to convict the prisoner. He should call witnesses to prove the charges irrespective of whether they are favourably inclined to the prisoner or not, and he must be careful not to omit taking evidence which may show the innocence of the prisoner or extenuate his crime. R. 59

He must take care not to bring forward evidence which is not relevant to the charge, and which may tend to prejudice the prisoner with the court, while all facts which tend to make the case clear should be entered into.

The prosecutor examines his own witnesses and cross-examines those of the prisoner, and explains his case by means of addresses if necessary. 99

70. COUNSEL AS PROSECUTOR.—A properly qualified counsel can appear on behalf of the prosecutor at general courts-martial, and such counsel shall assume the position of prosecutor, with all its advantages and disadvantages. R. 86 280

When counsel appears for the prosecution, at least seven days' notice before the trial must be given to the prisoner. R. 87

Civilian prosecutor.—A prosecution sometimes takes place at the instance of a civilian complainant. In such a case the civilian in question can aid the prosecutor by suggestions, but cannot himself address the court or take part in the proceedings further than giving evidence as a first witness. Sm. 472

71. JUDGE-ADVOCATE.—Officers authorised to convene general courts-martial out of the United Kingdom are by the terms of their warrant authorised to appoint judge-advocates to attend courts-martial. 77

Judge-advocates must always be present at general courts-martial, and may, if deemed expedient (in cases where the evidence is complicated), be ordered to attend district courts. R. 99

When the trial takes place at home, one of the deputy judge-advocates (who are military officers) are ordered to attend by the judge-advocate general upon application being made to him. The judge-advocate general may, however, if he thinks proper, depute any qualified officer to officiate as judge-advocate at a trial. Sm. 1288

In the case of a trial abroad a fit person is appointed by the officer convening the court. The proceedings of a court-martial are not invalid owing to any irregularity R. 99

in the manner of appointing a judge-advocate, provided he is a fit person.

The judge-advocate must be present when the court assembles, and it will be one of the first duties of the court to see that he is duly qualified. R. 22

Qualification of.—An officer who is disqualified to sit on a court-martial as a member cannot act as judge-advocate. R. 99 R. 19

Swearing of.—A judge-advocate is duly sworn at the same time as the rest of the court (see Form of Oath). All oaths and declarations are administered to the court and to witnesses by the judge-advocate if there is one. S. 52 R. 27 R. 26

Absence of.—When a judge-advocate has been appointed, the court cannot proceed unless he is present. If the judge-advocate falls ill or is unable to attend, a fit person may be appointed to replace him during the remainder of the trial. Care must be taken that the substitute is duly sworn. R. 64 R. 100

Objection to.—The judge-advocate, if properly appointed, cannot be objected to by the prisoner or the court. R. 25

Presence in closed court.—The judge-advocate remains present when the court is closed for deliberation. R. 62

As witness.—He can be called on as a witness for the defence, but not for the prosecution. S. 50

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72. CIVILIAN JUDGE-ADVOCATE. — Counsel may be appointed to act as a judge-advocate, but such civilian must not be the prosecutor or witness for the prosecution, and it is clearly undesirable that he should be an interested party, as the judge-advocate should be thoroughly impartial. R. 87 280 S. 50 R. 19 R. 101

When it is deemed expedient to call in the aid of counsel, it is more desirable that he should assist the military judge-advocate than that he should replace him. This course was adopted in the Fenian trials in Ireland in 1866. Sm. 463

73. DUTIES OF JUDGE-ADVOCATE. — At a court-martial the judge-advocate represents the judge-advocate general, and should maintain an entirely impartial position as the legal adviser of all parties connected with the trial. He should inform the convening officer of any defect in the charge or any informality in the constitution of the court. R. 101

He is responsible for informing the court as to any want of legality and formality of the proceedings, and the court should be guided by his opinion on any point of law or procedure that arises during the trial.

The court itself is responsible for the legality of its proceedings, and must consider the grave consequences which may result from disregard of advice given them on legal points.

Any information or advice given by the judge-advocate to the court must, if he or they wish it, be entered in the proceedings.

The judge-advocate equally with the president must take care that the prisoner does not suffer any disadvantage in consequence of his ignorance or incapacity, and to elicit the truth he may, with permission of the court, call witnesses or put questions to witnesses as he thinks fit. 66

Both the prosecutor and prisoner are entitled to ask the opinion of the judge-advocate on any question of law that is relative to the trial.

Summing up.—After the conclusion of the case the judge-advocate will sum it up if he considers it necessary, and after his summing up no further address is allowed. R. 41

The summing-up, if in writing, is attached to the proceedings, and, if not in writing, such *précis* of it as the judge-advocate thinks necessary is recorded. R. 93

Summoning witnesses.—The judge-advocate has the power of summoning witnesses not subject to military law, but it is rarely exercised at home, it being more convenient to leave such matters to the convening officer or president, who are on the spot. R. 77

Examining witnesses.—The judge-advocate can examine and cross-examine witnesses in the usual way, or may ask questions through the president. R. 81 R. 83

Recording proceedings.—The judge-advocate is responsible for a proper record of the proceedings in writing, and in important cases may have the assistance of a sworn shorthand writer. R. 93 **238**

Reporters are allowed to be present and take notes as long as the court is open. It is not usual to place any restrictions on them, but the court has a right to forbid any publication of its proceedings till after the close of the trial.

Custody of proceedings.—As long as the court sits the custody of the proceedings is in charge of the judge-advocate, and they may be inspected by the prosecutor, prisoner, and members of the court at any time up to the finding. R. 94

He should sign the proceedings after the president has done so, take charge of them, and forward them to the authority mentioned in the order convening the court. R. 44 R. 49 R. 95

Transmission of proceedings.—If held in the United Kingdom, the proceedings of general courts-martial are to be forwarded to the judge-advocate general for confirmation by Her Majesty; if held abroad, to the general or other officer who has power to confirm the sentence. District courts-martial are forwarded to the confirming officer. **134** Q. vi 108

74. JUDGE-ADVOCATE GENERAL'S DEPARTMENT. —The judge-advocate general is a member of Parliament, a privy councillor, and the responsible adviser of the Crown in all cases of general courts-martial which the Crown confirms. Sm. 462

The deputy judge-advocate general is usually a civilian lawyer, and the deputy judge-advocates are military officers who attend courts-martial as the representative of the judge advocate-general.

The judge-advocate general's department has the power of 'quashing' the proceedings of courts-martial *on the ground of illegality*, but cannot otherwise alter the finding or sentence. 148

In the case of the marines the judge-advocate general's department is represented by the Admiralty. S. 179

Care of proceedings.—The proceedings of general courts-martial are kept in the judge-advocate general's department for seven years, and those of district, summary, and field general for three years. Copies of the proceedings can be obtained on payment by the person tried, and a certified copy is admissible in evidence. 149

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CHAPTER IX.

ASSEMBLY OF COURTS-MARTIAL.

75. PRELIMINARY PROCEEDINGS. 76. CONVENING AUTHORITY. 77. WARRANTS. 78. APPLICATION FOR COURT-MARTIAL. 79. DELAY IN ASSEMBLY. 80. DUTY OF CONVENING OFFICER—Charges—Nature of Court—Assembling Court—Appointing Officers—Witnesses. 81. WARNING THE PRISONER. 82. ASSEMBLY OF COURT—Seating of Members—Hour of Sitting—Duty of President—Adjournments. 83. LEGAL INQUIRIES BY COURT. 84. APPEARANCE OF PRISONER.

75. PRELIMINARY PROCEEDINGS.—After investigating the charge against a prisoner, a commanding officer, if he does not dispose of the case summarily, must, without unnecessary delay, which must not exceed thirty-six hours, either refer the case to superior authority, order a regimental court-martial to assemble, or apply to a superior to convene a higher court. R. 4 37

76. CONVENING AUTHORITY.—A *general* court-martial can be convened by Her Majesty, by an officer holding a warrant from Her Majesty, or by an officer to whom power has been delegated by warrant from the officer originally given authority by Her Majesty. (Army Form A. 1.) S. 122

District courts-martial can be convened by any officer authorised to convene general courts-martial, or by an officer who has received a warrant from such an authority. (Army Form A. 5.) S. 123

The convening officer of a general or district court-martial cannot be under the rank of captain, and in the case of a general court-martial must be a field officer, except in cases of emergency which might occur *abroad*.

Regimental courts-martial can be convened by any officer authorised to convene the higher courts, by a commanding officer, or officer in command of two or more detachments, provided he be not under the rank of captain, and on board ship by a commanding officer of any rank. If assembled on board a ship in commission the permission of the captain of the ship is required. S. 47 R. 128 Q. xvii 73

The proper authority to convene a regimental court-martial is the commanding officer of the prisoner, and officers senior to him who have occasion to order a case to be disposed of by this court should direct the commanding officer to convene it instead of doing so themselves. Q. vi 75

77. WARRANTS.—The warrants above referred to which are now in force are those issued under the sign-manual of the Queen and signed by the Secretary of State and sent to Commanders-in-Chief at home and abroad, the Commanders-in-Chief of the Indian Presidencies, general officers in command abroad, and officers commanding districts at home.

Any of these officers have authority to issue delegated warrants (Army Form A. 1 and 5) to officers under their command (not below the rank of field officer) to convene general courts-martial, and to officers (not below the rank of captain) to convene district courts-martial. S. 122 S. 123

Warrants issued to officers abroad authorise the appointment of judge-advocates and provost-marshals. 195

The power of a warrant is not affected by the locality in which the crime was committed.

Warrants vary in power according to whom they are addressed. Those issued to general officers abroad give full powers as to convening and confirming general courts-martial and authority to delegate that power.

Those issued to general officers at home only give the power of *convening* general courts-martial, but not of confirming them, or of delegating the power of convening them.

Any officer authorised to convene general courts-martial has authority to delegate if he chooses full power as to convening and confirming district courts.

The proceedings of a court-martial which has sentenced an officer to death, penal servitude, cashiering, or dismissal must be sent for confirmation, if it occurs in India, to the Commander-in-Chief there ; if the trial takes place elsewhere, to head-quarters at home. **145**

In the case of an army in the field its commander would hold a special warrant which would probably empower him to confirm in all cases.

78. APPLICATION FOR COURT-MARTIAL. — When making application to a convening officer for a district or general court-martial, the commanding officer forwards with it the charge-sheet, summary of evidence, company defaulter sheets, list of witnesses to be called, and a statement as to character and particulars of service of the prisoner. (Army Form B. 116.) **37** **220** **213** **121**

79. DELAY IN ASSEMBLY.—A regimental court-martial should as a rule be assembled the day after the charge is investigated, care being taken that there is an interval of not less than eighteen hours between the arraignment and investigation. The delay in ordering the assembly of a regimental court-martial or in applying to a superior to convene it or a higher court should never exceed thirty-six hours. **R. 4** **R. 14** **R. 16**

A general or district court should be ordered to assemble within eight days after the prisoner has been taken into custody, or a special report must be made. If the court does not assemble within fifteen days after the application **S. 45** **R. 17**

for it is received (or within thirty days if out of the United Kingdom), a report must be made by the convening officer to the Commander-in-Chief explaining the reasons for the delay. 19

80. DUTY OF CONVENING OFFICER.—The convening officer must satisfy himself that the charges made disclose an offence under the Army Act, and that the evidence forthcoming is sufficient to justify the trial of the prisoner. R. 17 Q. vi 84

Charges.—He can use his discretion in revising the charges and striking out minor ones, or those upon which he thinks—after perusing the summary of evidence—that sufficient evidence is not forthcoming. If not satisfied that the charge can be legally sustained, he can either order the release of the prisoner or refer the case to superior authority. Q. vi 85 221

Nature of court.—The nature of the court by which the prisoner is to be tried is next decided upon. The convening officer can either refer the matter to superior authority, order the commanding officer to dispose of the case by regimental court-martial, or convene a general or district court-martial if he has the power to do so. In fixing on the particular court the convening officer must keep in mind the nature of the offence, the character of the prisoner, the state of discipline at the time and place the offence was committed, and the particular circumstances of the case. There are but few crimes which cannot be effectually dealt with by district courts-martial, and the higher court should be reserved for aggravated cases of misconduct and those offences against the enlistment laws which are punishable by penal servitude. Q. vi 63 Q. vi 68, 69, 72

The original charge and summary of evidence should be sent to the president of the court-martial before its assembly if it be decided to try the case, and the prosecutor should be given either copies or allowed access to the originals. R. 17 66 68

Order assembling court.—The order for the assembly Ap. II

of a particular kind of court-martial for the trial of the prisoners at a convenient time and place has then to be issued.

The president (and judge-advocate if any) is detailed by name, and the members and waiting members are either mentioned by name, or the number of officers of each rank and regiment to be furnished is stated.

The order closes with a notification that the prisoners are to be warned and witnesses required to attend, and states where the proceedings are to be sent. 81 66 73

Appointing officers.—General and district courts-martial are army courts as contrasted with regimental ones, which usually, though not necessarily, are formed from one corps. No district or general court must be formed from officers of one regiment of cavalry or battalion of infantry, if it is possible to get officers of different corps to sit. R. 20

When a trial is likely to be prolonged it is usual to appoint two or four members more than the legal minimum, with the view that if a member falls sick during the trial, or is from other causes unable to attend, the trial can go on. Q. vi 93 S. 53 67 139

Similarly it is usual to detail one or more waiting members who can take the place of a member who is successfully challenged.

It must be remembered that no officers can be added to a court after the prisoner is arraigned, and that a member who is absent while any portion of the evidence is being taken cannot again resume his seat. R. 67 84

Witnesses.—The convening officer must arrange that any witnesses whose names have been forwarded to him are summoned or ordered to attend, provided their attendance can reasonably be procured. R. 77 78

The person requiring the attendance of a witness may be required to defray expenses thereby incurred.

81. WARNING THE PRISONER.—A prisoner should be afforded every facility for preparing his defence. A copy R. 13

of the summary of evidence should be given to him in all complicated cases, and in ordinary cases he should be granted one if he demands it. As soon as the charges 214
are decided on, a copy of them should be forwarded to him, at least eighteen hours before the assembly of a regimental court-martial, and twenty-four hours before that of a higher court. The charges should be explained R. 14
to him if necessary, and he should be asked for the names 237
of his witnesses, and, if he demands it, be informed of the names of the officers composing the court. Notice must R. 15
also be given him if he is to be tried jointly with other 96
prisoners.

The notification to the prisoners must be made personally by an officer, who is usually the prosecutor or an officer of the offender's own corps.

When an officer is to be tried he should be furnished R. 8
by the convening officer with an abstract of the evidence 236
to be adduced.

82. ASSEMBLY OF COURT.—The court assembles at the time and place mentioned in the order convening the court.

Officers attend courts-martial in the following dress :—General court-martial, review order ; district court-martial, marching order ; regimental court-martial, drill Q. xii
order. 13

Seating of members.—The president takes his place at the head of the table and sees that the members are seated according to their rank and seniority, the senior member being placed on his right hand, the next senior 66
on his left, and so on.

On district and general courts-martial seats will be R. 57
taken by army rank, but on a regimental court-martial, where officers of one regiment only are present, by regimental rank.

If an officer be promoted during trial, he changes his seat according to rank, but he can in no case displace the

president, who remains president of the court till it is dissolved.

Hour of sitting.—Courts-martial can sit any time between six and six, on any day except Sunday, Christmas Day, or Good Friday, but should not sit more than eight hours in a day. In the United Kingdom trials usually commence at ten or eleven o'clock. In cases of emergency a court can sit at any hour on any day. R. 63 Q. vi 96

Duty of president.—The president sees that all the members and judge-advocate are present, and that the charge-sheet, summary of evidence, and the usual official books and papers are on the table, and notes on the proceedings the hour at which the court opens. 66

Adjournments.—A trial should, as a rule, be continued from day to day, but a court may adjourn, if necessary, both from time to time as well as from place to place. When a court adjourns to view a place the whole court must go and not merely send a deputation, and the prosecutor and prisoner must accompany them. Adjournments should not take place except when they are necessary to further the ends of justice, and should not be made in order to afford the prosecutor or prisoner time to procure evidence, unless it is clear that they had insufficient opportunity to do so. If the date to which the adjournment is made is not fixed by the court, the matter must be reported to the convening authority, who will arrange that an order is given for the subsequent assembly. In cases of emergency which might arise on active service, the senior officer on the spot can adjourn or prolong the adjournment of a court. The usual causes of adjournment are—that a court is not satisfied as to its legal constitution, or as to the qualification of the judge-advocate; that it has doubts as to its jurisdiction, the amenability of the prisoner to military law, or the explicitness of the charge; that the prisoner has not been properly warned, or has had insufficient time to prepare his defence; that material witnesses are not present; that witnesses have been called without due notice to the S. 53 R. 62 R. 64

prisoner; that the president, judge-advocate, or the legal minimum of officers is not present, or that the prisoner from illness or other causes is unable to attend. 190

83. LEGAL INQUIRIES BY COURT.—The order convening the court and appointing the president and judge-advocate is then read, and if it appears on the face of it correct is signed by the president and attached to the proceedings.

The court must next satisfy themselves as to the legality of their constitution, the amenability of the prisoner to trial, and the validity of the charge. It will save time if the following points are briefly considered seriatim :— R. 22 R. 23

1. That the legal minimum of officers is present; and the members are subject to military law, have sufficient service, and in the case of a general court-martial are of the required rank. S. 48 18 R. 19 R. 21

2. That the president is of the proper rank.

3. That the members and judge-advocate are not disqualified. R. 19 R. 99

4. That the prisoner was amenable to military law when he committed the offence. (Exception: men belonging to the reserve and auxiliary forces can be tried for certain offences committed when not amenable.) 18 M.A.23 R.F.A. 6, 15

5. That the prisoner, as a field officer, commanding officer, warrant officer, member of the auxiliary forces, or camp-follower, is able to be tried by the court as constituted. S. 184 Q. vi 95 S. 182 R. 20 R. 21

6. That the charge discloses an offence under the Army Act, is properly framed, and is sufficiently explicit. R. 23 221

7. That the trial of the offence is not barred by lapse of time. S. 158 S. 161 R.F.A. 26

The court, if not satisfied on any of these points, must adjourn and report to the convening officer. While this preliminary investigation is going on the court is an open one, and the prosecutor or other persons can claim to be present. M.A. 43 82

84. APPEARANCE OF PRISONER.—If the inquiries made by the court prove satisfactory, the prosecutor takes his place and the prisoner is brought before the court. R. 24

Prisoners ordered for trial are to be examined by a medical officer on the morning of each day that the court is ordered to sit, and commanding officers will be held responsible that no prisoner is brought before a court-martial if in the opinion of the medical officer he is unfit to undergo his trial. Q. vi 97 125

Prisoners should not be handcuffed or fettered unless absolutely necessary. Q. vi 97

If an officer is being tried he is usually allowed a seat, and the court can grant the same privilege to any prisoner if they think it necessary either from the length of the trial or other circumstances. Sm. 473

The proceedings of the court-martial as far as it has already gone are read over in the hearing of the prisoner as well as the order convening the court.

When the names of the president and members are read out, each answers to his name.

CHAPTER X.

CHALLENGES—ARRAIGNMENT OF PRISONER.

85. CHALLENGE BY PRISONER. 86. VOTING ON OBJECTION. 87. OBJECTION TO MEMBER—To Interpreter. 88. OBJECTION TO PRESIDENT. 89. LIMITS TO OBJECTIONS. 90. CHALLENGE BY SEVERAL PRISONERS. 91. GROUNDS FOR CHALLENGE. 92. SWEARING-IN OF COURT. 93. ARRAIGNMENT OF PRISONER—Joint Trial. 94. PLEA IN BAR OF TRIAL. 95. PLEADING TO CHARGE. 96. CLAIM FOR SEPARATE TRIAL.

85. CHALLENGE BY PRISONER.—After the prisoner has heard the names of the officers composing the court read over he is asked if he objects to any of them. If he does object he is asked to name *all* the officers against whom he desires to raise a protest. R. 25 89

The case of each officer objected to is decided on separately, the junior being taken first.

The prisoner can bring witnesses to support his objection, and they can be examined and cross-examined in the usual way, but as the court is not yet sworn it cannot administer an oath to the witnesses.

86. VOTING ON OBJECTION.—The court, after hearing and recording the statements made, is cleared to consider the objection.

All the officers present (except the one the objection to whom is being considered) then vote as to whether the objection shall be allowed or not.

(The officer objected to would usually withdraw, but need not necessarily do so.)

An objection to a member is allowed if one-half of the votes, to a president if one-third of the votes, are in favour of it. S. 51

(The president has not a casting vote, as the trial has not commenced.) S. 53 66

87. OBJECTION TO MEMBER.—If the objection to a member is allowed he must retire. The vacancy is filled by one of the officers in waiting, and the prisoner must be given an opportunity of challenging any such new member. R. 25

If there are no waiting members the court would ordinarily adjourn and report to the convening officer. In cases of emergency the court can, however, go on if its numbers are not reduced below the legal minimum, but the reason for so acting must be recorded in the proceedings. R. 18

To interpreter.—An objection may be raised to an interpreter or shorthand writer on the ground that he is not impartial. A member of a court or the judge-advocate may act as interpreter, though it is not advisable, but the prosecutor should not do so, as a question might fairly arise as to his partiality. R. 71 Sm. 478

88. OBJECTION TO PRESIDENT.—If the objection to the president is allowed, the court must adjourn, and the convening officer can either appoint another president or convene another court. The senior member of the court, if of sufficient rank, and there be the legal number of officers, may be appointed president. R. 64 S. 51 R. 18 S. 53

89. LIMITS TO OBJECTIONS.—A prisoner cannot object to the prosecutor or judge-advocate, as they do not form a part of the court. R. 25 68 71

The prisoner at this stage cannot object to the court as a *whole*, although he can do so subsequently, *after the court is sworn*. If the prisoner persists in objecting to the court collectively it must be taken to mean that he objects to each officer composing it, and such objections must be dealt with in the usual way. Sm. 496

30. CHALLENGE BY SEVERAL PRISONERS.—When a number of prisoners have to be tried by one court, they may be all brought up together and the question of objections be disposed of and the court sworn. The trial of each case can then go on separately. Care must be taken that each prisoner has been given an opportunity to object to the members of the court which actually tries his offence. R. 70

Where one alone of the prisoners raises objection to a member, the court can, if it thinks fit, proceed with the trial of the other prisoners, and postpone considering the case of the objecting prisoner till the other offenders are disposed of.

31. GROUNDS FOR CHALLENGE.—The court has to decide on the reasonableness of the challenge from the *assertions* of the prisoner, the witnesses examined, and the officer objected to, though the latter, as a rule, is not called on to make a statement. Sm. 500

The ordinary grounds of challenge are, that a member is— 64

(1) Not qualified to sit on the court. R. 19

(2) Is a material witness. R. 21

(3) Is prejudiced against the prisoner.

The slightest personal interest in the case would constitute a disqualification ; for example, an officer cannot sit on the court for the trial of a man who has stolen property from the mess of his regiment. O'D. 139

It is always desirable to allow objections unless they

are obviously groundless. When an officer is objected to on the ground of prejudice or malice he should, under ordinary circumstances, request permission to withdraw.

92. SWEARING IN OF COURT.—When the challenges have been disposed of the court is sworn in due form (for oath see S. 52). S. 52

The oath is administered by the judge-advocate, or, if R. 30. a judge-advocate is not present, the president swears in the members, and afterwards one of the members R. 26 swears in the president.

The judge-advocate is then sworn by a member of the R. 27 court (usually the president), and the witnesses are re- Ap. 11 quested to withdraw.

An interpreter or shorthand writer can be sworn either now or at any convenient time during the trial.

When any person has a sincere objection to take the **233** oath, a solemn declaration to the same effect as the oath S. 52 can be made. R. 28

93. ARRAIGNMENT OF PRISONER.—The charges in R. 31 the charge-sheet are now read out to the prisoner one by **213** one, and he is asked to plead to them separately. **95**

When there is more than one charge-sheet, the arraignment and subsequent proceedings up to the find- R. 61 ing should be taken on *each charge-sheet separately.*

Where there is more than one charge on a charge-sheet the prisoner may claim to be tried separately in respect of any charge or charges, and, if the claim is not unreasonable, the court deals with the charges as if they were on separate sheets.

Joint trial.—Any number of prisoners may be tried R. 15 together for an offence which they have committed **101** collectively. **218**

94. PLEA IN BAR OF TRIAL. — Instead of pleading directly to the charge, the prisoner may put in a

plea in bar of trial which may assume the following forms :—

(1) An objection to the charge on the ground that it does not disclose an offence under the Army Act, and is not in accordance with the rules of procedure. R. 32

(2) An objection to the jurisdiction of the court, which would ordinarily refer to the fact— R. 34

(*a*) That the court is illegally constituted. R. 22

(*b*) That the prisoner is not subject to military law. 63 18

(*c*) That the prisoner is not amenable to the court as constituted. For instance, a warrant officer or camp follower could not be tried by regimental court-martial, or a field officer could not be tried by a court upon which a subaltern sat as member.

(3) An objection to being tried on the ground that the offence has been condoned or pardoned, that the prisoner has already been acquitted or convicted of the offence, or that trial is barred from lapse of time. 113 52 S. 161

Evidence may be heard in support of the plea, and the court decide in the usual manner by a majority of votes whether it shall be allowed or not. R. 34

If the court overrule the plea, the trial proceeds. If the plea be allowed, the court record their reasons for their decision, adjourn, and report to the convening officer, who either convenes another court or releases the prisoner.

If the court are in doubt as to the validity of the plea, they can either (1) adjourn and refer to the convening officer, or (2) record a special decision to proceed with the trial, leaving the dubious point to the confirming officer to decide. In the last case the confirming officer, if of opinion that the plea was valid, should not confirm the finding, and the trial would therefore be void.

Any plea of the prisoner as to the offence having been condoned, or that he had been previously tried for the same offence, &c., may be raised by him subsequently in the defence instead of 'in bar of trial.' 112

95. PLEADING TO CHARGE.—If no special plea is offered, or if such a plea has been overruled, the prisoner must either plead 'guilty' or 'not guilty.' If he refuses to plead, or does not do so intelligibly, a plea of 'not guilty' is entered for him. R. 35 97

Before recording a plea of 'guilty' the court should ascertain that the prisoner clearly understands the nature of the charge to which he has pleaded, and be *particular* to inform him of the difference in procedure caused by his plea. If a prisoner, though admitting the offence, wishes to show extenuating circumstances, he should plead 'not guilty,' in order to be able to produce evidence on his own behalf. There is nothing false in a prisoner pleading 'not guilty,' as it simply means that he desires a formal trial. 105 R. 35

A prisoner may at any time during the trial withdraw his plea of 'not guilty' and plead 'guilty,' and the further taking of evidence can be stopped and the court proceed at once to its finding. R. 37

If a plea of 'guilty' is recorded, and it appears from the statement of the prisoner, or otherwise, that he did not understand the effect of his plea, the court should, instead of proceeding to the *finding*, alter the record, enter a plea of 'not guilty,' and proceed with the trial accordingly. R. 36 105

96. CLAIM FOR SEPARATE TRIAL.—After the charges are read, and before the witnesses are sworn, a prisoner who is being tried jointly with others can claim a separate trial on the ground that the evidence of some of the other prisoners is material to his defence. The court should allow the claim if it is reasonable and the charge admits of it. For instance, a separate trial could not be claimed by a prisoner who is charged with combining with others to excite a mutiny or form a conspiracy. R. 15

CHAPTER XI.

PLEA OF NOT GUILTY—ADDRESSES.

97. PROCEEDINGS ON PLEA OF NOT GUILTY. 98. ADDRESSES—First—Second. 99. PROSECUTOR'S ADDRESS. 100. PRISONER'S ADDRESS. 101. ORDER OF ADDRESSES—Prisoner calls Witnesses—Does not call them—Prisoners tried jointly. 102. RECORDING ADDRESSES. 103. ADDRESS BY COUNSEL—Prisoner's Statement. 104. REMARKS.

97. PROCEEDINGS ON PLEA OF NOT GUILTY.—When the prisoner pleads not guilty, it is necessary for the prosecutor to prove, by the evidence of sworn wit- 69
nesses, the substance of the charge alleged against the prisoner.

The prisoner, on the other hand, has to explain away or refute the charges made against him by the same means.

98. ADDRESSES.—In complicated cases the prosecutor or prisoner is allowed to make an opening address before the examination of his witnesses, and a second address after the witnesses are examined.

Addresses are usually in writing, and after they have been read are handed to the president, signed by him, and attached to the proceedings.

When a verbal address is made, the portions that the court think material should be taken down as far as possible in the words of the person delivering them, and any request of his as to the recording of a particular statement should be attended to.

It must be remembered that the value of an address depends wholly on the statements made in it being borne out by the evidence on oath of witnesses.

First address.—An opening address should point out clearly the view of the case taken by the person who makes it, and state in sequence the several facts, with their bearing on the case, which it is proposed to prove.

Second address.—A second address should sum up the evidence hitherto given, show how far it supports the statements made in the first address, and explain away the hostile evidence made in reply.

99. PROSECUTOR'S ADDRESS.—The opening address of the prosecutor should be confined to an intelligible explanation of the facts which he is about to prove. He must not enter into any irrelevant matter, or make any statement he is not prepared to prove, or use any violent language or strong expressions with a view of prejudicing the prisoner in the eyes of the court. R. 59 69

It is the duty of the court to check the prosecutor if he shows any want of moderation or fairness to the prisoner.

The second address of the prosecutor varies in character according to whether the prisoner has called witnesses to refute the charge or not. In the latter case the address must be strictly confined to summing up the evidence actually given. In the former comments may be made as to the extent to which the evidence of the witnesses for the prosecution has been impaired by those for the defence.

The prosecutor is, however, in an official position, and is bound to act with scrupulous fairness towards the prisoner. He should not keep back or gloss over the weak points of the prosecution, and should not attempt to open new ground or misrepresent the evidence already given. Sm. 606

100. PRISONER'S ADDRESS.—The utmost liberty should be allowed to the prisoner in making his addresses. He can question the motives of the prosecutor and his witnesses, lay blame on other persons, and discuss matters not immediately relevant to the charge. R. 59

The court may caution the prisoner that in bringing irrelevant charges he renders himself liable to be proceeded against under S. 27, or may point out that the line of defence he is taking is not likely to be of service to him. Provided, however, he is not disrespectful to the court, and does not use insulting language to other persons, his defence should not be checked. 104 103

101. ORDER OF ADDRESSES.—The procedure as to addresses after the plea of 'not guilty' is recorded varies as follows :—

(1) *When the prisoner does call witnesses* (other than witnesses to character). R. 33

(*a*) The prosecutor may, if he desires, make an opening address.

(*b*) The evidence for the prosecution is taken. 236

(*c*) The prisoner may, if he desires, make an opening address. R. 40

(*d*) The evidence for the defence is taken. 237

(*e*) The prisoner may make a second address.

(*f*) The prosecutor is entitled to an address in reply.

(*g*) The judge-advocate, if present and it is deemed necessary, will sum up. R. 41

(2) *When the prisoner does not call witnesses* (other than witnesses to character). R. 39

(*a*) The prosecutor may, if he desires, make an opening address.

(*b*) The evidence for the prosecution is taken.

(*c*) The prosecutor may make a second address for the purpose of summing up his evidence.

(*d*) The prisoner may make an address in his defence.

(*e*) Evidence for defence as to *prisoner's character* may be produced. 253

(*f*) The prosecutor may, as a reply, produce proofs of former convictions, but cannot again address the court.

(*g*) The judge-advocate can sum up if necessary.

Joint trials.—When two or more prisoners are being tried together the evidence and addresses of all the prisoners should be taken together, and the prosecutor's address and reply must be made in reference to the prisoners collectively in the same manner as if there was only one prisoner. R. 60 131 213

102. RECORDING ADDRESSES.—When any address or summing-up is not in writing it need not be recorded to a greater extent than the court think necessary; but the court must in every case make a sufficient record of the defence of a prisoner to enable the confirming officer to understand the reply he makes to the charges, and any particular matter in the addresses must be taken down at the request either of the prosecutor or prisoner. R. 93

103. ADDRESS BY COUNSEL.—A complication ensues when counsel is employed by the prisoner. The counsel acts for the prisoner throughout the trial, examines and cross-examines the witnesses, and addresses the court *instead of the prisoner*, and where the prisoner does not interfere with the counsel the order of procedure is the same as if counsel had not been employed. R. 87 280

Prisoner's statement.—The prisoner, however, *has the right* to make a verbal statement at any time after the close of the prosecution, and before his counsel makes his final address. R. 92

At the commencement of the defence the prisoner is asked if he wishes to make a statement, and if he declares his intention of *not* making a statement the procedure

depends, as before, as to whether witnesses (other than witnesses to character) are called for the defence or not.

When a prisoner decides that he will make a statement, it does not matter whether witnesses for the defence are called or not. The prosecutor may ask permission to call witnesses in reply, and hence the procedure is the same as if witnesses had been called in the defence.

The statement is not made on oath nor is the prisoner liable to be questioned with reference thereto. It would usually be made immediately after the witnesses for the defence have given their evidence.

104. REMARKS.—All the facts alleged in the addresses must be proved by the sworn testimony of witnesses. In simple cases addresses are not necessary, and the evidence of the witnesses is taken in the above order.

As a rule, if the prisoner does not call witnesses (other than to character) he has the *last word*; if he does call witnesses the prosecutor has the last word.

It should be noted that the evidence produced by the prosecution must be finished before the prisoner is called upon for his defence.

When, however, any new matter which the prosecutor could not reasonably have foreseen has been introduced by the prisoner in his defence, or where the prisoner has called witnesses as to character and it is necessary to prove previous convictions, the prosecutor may call witnesses to give rebutting evidence. R. 84 **239**

After the summing up of the judge-advocate, or after the final address, or, when there are no addresses, after the evidence of the defence is completed, the court is cleared for the purpose of considering its finding.

As to the manner in which evidence is taken, see the chapters on Evidence and Witnesses.

CHAPTER XII.

PLEA OF GUILTY AND PARTLY GUILTY.

105. PROCEEDINGS ON PLEA OF GUILTY—Warning to Prisoner—Question to Prisoner. 106. FINDING. 107. TAKING EVIDENCE—As to Character—In mitigation. 108. PLEAS OF GUILTY AND NOT GUILTY—Procedure.

105. PROCEEDINGS ON PLEA OF GUILTY.—A plea of 'guilty' is a conclusive admission by the prisoner of his guilt, and further evidence is not required for the purpose of proving the charge. Sm. 553

When a prisoner pleads 'guilty,' care must be taken to explain the charge to him, and prevent him pleading in error. For instance, a man might be charged with 'wilfully injuring the property of a comrade,' and plead guilty to doing so, but state at the same time that he did not inflict the injury intentionally. As he did not act 'wilfully' a plea of 'not guilty' should be entered.

Again, a man might plead guilty to desertion, but render the plea obviously an improper one by stating that he always intended to return.

Warning to prisoner.—The court, after satisfying themselves that the prisoner fully understands the charge, should explain (through the medium of the president) the effect that the plea will have on the trial. It is advisable to point out to the prisoner that the court will at once record a finding of guilty, and that they will only take evidence in order to enable them to fix the amount of punishment. If, therefore, a prisoner has a defence of any kind to the charge, he should plead 'not guilty' in R. 35

order that it may be considered by the court before they proceed to a finding.

Question to prisoner.—If the prisoner determines on pleading 'guilty,' he is formally asked whether he has any statement to make in reference to the charge.

If the prisoner states any extenuating circumstances which should in the opinion of the court be proved, or if it appears he does not clearly understand the effect of his plea, or if he for any reason, however mistaken, wishes to call witnesses other than to character, a formal plea of 'not guilty' should be recorded and the former plea altered. R. 86

The statement made by the prisoner before the finding is unsupported by witnesses, and he cannot be cross-examined thereon.

106. FINDING.—After having taken every reasonable precaution that a prisoner is not prejudiced by his plea of guilty, the court takes down any statement he wishes to make in reference to the charge, and a finding of guilty is at once recorded. R. 86

107. TAKING EVIDENCE.—Evidence is then taken sufficient to enable the court to determine the sentence and allow the confirming officer to know the circumstances of the case. In the case of general and district courts-martial it will be sufficient to read out the summary of evidence and attach it to the proceedings. In the case of a regimental court-martial, and where there is no summary of evidence, sufficient evidence must be taken by the court in the usual way. The prisoner may cross-examine the witnesses, but cannot produce witnesses in his defence. The justice of the finding has been by him already admitted, and any evidence in mitigation of punishment is taken at a later stage. 238 247

As to character.—The court have next to determine

the prisoner's character, and he is allowed to call wit- 101
nesses to character, who are examined in the ordinary 253
way.

The court then take the usual sworn evidence of an R. 45
officer of the prisoner's corps as to his character and 121
particulars of service.

In mitigation.—Any statement by the prisoner in R. 86
mitigation of punishment can now be received, and the court can, if they think fit, allow the prisoner to call witnesses to prove the statements he makes.

The subsequent proceedings as to sentence, confirmation, &c., are the same as when a plea of 'not guilty' is being dealt with.

103. PLEA OF GUILTY AND NOT GUILTY.—When a prisoner pleads guilty to some and not guilty to other charges, care must be taken that he thoroughly understands the effect of his plea of guilty, and if there is any doubt about it a plea of not guilty should be entered. Again, doubts may arise in the case of alternative charges as to the effect of a plea of guilty, and in such cases it is better to enter a plea of not guilty.

When charges are in the alternative the court has the power of entering 'not guilty' against each charge. This is in order to prevent a prisoner pleading guilty to a lesser offence, and thereby escaping the punishment of a greater one which is charged in the alternative..

Procedure.—After all reasonable precautions have R. 86
been taken that the prisoner understands the effect of the pleas he has made, the court proceeds with respect to the charges to which 'not guilty' has been pleaded first, and takes the evidence of the witnesses and comes to a finding. The court then finds the prisoner guilty of the charges which he has admitted, and the finding being thus complete the ordinary proceedings preparatory to sentence follow.

CHAPTER XIII.

THE DEFENCE.

109. THE DEFENCE—Prisoner's Friend. 110. HELP FROM PRESIDENT. 111. DUTY OF COURT. 112. PLEAS AVAILABLE. 113. REMARKS ON PLEAS—Insanity—Compulsion—Previous Trial—Condonation — Misfortune—Ignorance—Drunkenness.

109. THE DEFENCE.—A prisoner, whether he has pleaded guilty or not guilty, is always entitled to make a defence, which he must either carry out himself or permit his counsel or an officer subject to military law, who has the same privileges as counsel, to carry out for him. The prisoner cannot address the court or examine witnesses if his counsel does so. The only exception to this rule is that a prisoner can at the close of the prosecution make an oral statement as to the offence with which he is charged, but such statement is not made on oath, nor is the prisoner liable to be questioned in reference to it. R. 85 **280** **103** R. 92

Prisoner's friend.—If the prisoner wishes to put in a written statement or address it would be read by the counsel for the defence, or, if there is none, by the prisoner or any friend of his who is not assisting him professionally.

If the statement or address is not written, sufficient record of it must be taken down to enable the confirming officer to judge of its purport.

A prisoner can always have a person to assist him during the trial and suggest to him what questions he should put, &c., but such person cannot address the court unless he has the rights of counsel. **280**

110. HELP FROM PRESIDENT.—It is the duty of the president and judge-advocate to see that the prisoner does not suffer any disadvantage in consequence of ignorance or inability to examine witnesses. The president and judge-advocate should therefore put any questions to witnesses which may tend to elicit the truth, or may call witnesses for the purpose of supporting the prisoner's case. Particular care should be taken to see that the evidence given by the witnesses for the prosecution is similar to that in the summary of evidence, and if there is a discrepancy the witnesses should be cross-examined by the court on behalf of the prisoner. R. 58 66 73

111. DUTY OF COURT.—The court is bound to hear whatever defence the accused may think fit to adopt. 'The utmost liberty consistent with the interests of parties not before the court, and with the respect due to the court itself, should at all times be allowed to the prisoner. He has an undoubted right to impeach by evidence the character of the witnesses brought against him, and is justified in contrasting and remarking on their testimony and on the motives by which they or the prosecutor may appear to have been influenced.' A court-martial can hardly go wrong in allowing the greatest freedom of speech, but should caution the prisoner, if necessary, that intemperate speech and wild accusations do not further his cause, and may, if indulged in without excuse, lead to his trial on a charge of making false accusations. Sm. 587 100

112. PLEAS AVAILABLE.—A prisoner in his defence may plead that—

1. The charge is not proved.
2. The evidence of the prosecution is contradictory or unworthy of belief.
3. There was an absence of criminal intent.
4. He was insane when offence was committed.

5. He acted under compulsion.

6. He had been acquitted or convicted of the offence or summarily punished for it. 52

7. The offence had been condoned or pardoned. 113

8. The trial is barred by limitation of time.

9. The offence occurred through misfortune, chance, mistake, physical incapacity, or necessity.

Pleas against the jurisdiction of the court, if not before urged, may be brought forward, as well as any plea in mitigation of punishment. 94

113. REMARKS ON PLEAS.—The value of the defence made by the prisoner depends mainly on the extent to which it is supported by sworn evidence. Mere statements are of little value unless strongly corroborated.

The extent to which a prisoner is able to excuse or justify himself, or break down the evidence of the prosecution, is a question for the court to decide.

When an unlawful act is committed criminal intent is presumed, and it is for the prisoner to prove the absence of such intent. 251

Insanity.—Insanity excuses from guilt. R. 56

Compulsion.—Compulsion is held to be a good defence if it can be shown that the prisoner was compelled by actual force or acted under fear of death. Sm. 597

A soldier, again, is bound to obey the *lawful* command of his superior officer, and before a *court-martial* it would be held that a soldier is bound to obey the command of his superior officer if the illegality of it was not on the face of it apparent. Sm. 595 160

Previous trial.—That the case has already been dealt with by a civil court, court-martial, or a commanding officer is a good defence. S. 46 S. 157 S. 162

Condonation.—Condonation means the formal pardoning of an offence by a superior who has authority to dispose of the case and who has a full knowledge of the attendant circumstances. If an offender is ordered to do 94 19

duty either through some misapprehension or on account of the exigencies of the service, the offence is not thereby condoned. No person can condone an offence except he has the power to dispose of the case, and the act of condonation will nearly always proceed from a commanding officer.

Misfortune.—When mischief arises through a misfortune, chance, or mistake, the main point to consider is whether the original act was a lawful one or not. If the act be lawful the prisoner has committed no crime; if the act be unlawful he is liable for the consequences of his act. For example, a soldier is at target practice under ordinary conditions, and a bullet ricochets off the range and kills a man. The soldier is not guilty of any crime. If, however, a man fires a rifle in the air in the middle of London he commits an unlawful act, and if the bullet killed any one he would be guilty of manslaughter. Sm. 592

Ignorance.—Ignorance of the law, or mistaking the purport of a law or order, is no defence. Ignorance of *fact* is generally (but not always) admitted as an excuse if the ignorance does not arise from wilfulness or negligence. Sm. 59 **251**

Drunkenness.—Drunkenness is no excuse for crime. At the same time there are cases in which the fact that a man was drunk may justify a court-martial in awarding a less punishment than it otherwise would. Sm. 591 **184** **188**

Incapacity through physical illness might in some cases be pleaded as an excuse. If a soldier disobeyed a command with which he was physically unable to comply he could not in justice be found guilty of disobedience.

Necessity may be admitted as an excuse for crime when the prisoner can prove that the act was done solely to prevent some serious evil from falling on himself or others whom it was his duty to protect. O'D. 16

CHAPTER XIV.

THE FINDING.

114. Closing the Court. 115. Deliberation—Recalling Witnesses—Adjournment. 116. Voting. 117. Finding. 118. 'Not Guilty.'—Honourable Acquittal. 119. Special Findings — On alternative Charges — Of Insanity—Of cognate Offences—Remarks.

114. CLOSING COURT.—After the whole of the evidence for the prosecution and the defence has been heard, the court is closed for the purpose of deliberating on the finding. R. 42

The judge-advocate remains present in order that he may advise the court on legal points. When the evidence is voluminous he produces such notes or index to the evidence as may help the court in referring to the record ; but it is entirely beyond his province to express any opinion as to the case except on a point of legality. R. 62 Sm. 610

115. DELIBERATION.—The court should endeavour to be absolutely impartial, and should not be influenced by any circumstance not immediately connected with the charge. The fact that a prisoner has appealed from the award of his commanding officer, or that the convening officer has thought fit to send the case for trial to a certain species of court, should in no way affect the finding. 51

It must be remembered that by the terms of the oath the members are bound to try the prisoner *according to the evidence* or testimony of sworn witnesses.

In complicated cases it will be advisable for the president to put clearly before the court the statements which they have to decide on one by one. As each statement is put forward the members can discuss how far it has been supported by sworn evidence, and must put aside as valueless any mere allegations made by the prosecutor or prisoner. The court must not find a man guilty unless they are satisfied that the prosecutor has *proved* his guilt. If the prosecutor neglects his duty, it is not for the court to make good his deficiencies, and the benefit of the neglect should be given to the prisoner.

Recalling witnesses.—The court can, if they wish, call or recall any witness, but to do so the court must be re-opened, and the prosecutor and prisoner be allowed to be present, and, if necessary, to put questions to such witness through the president. R. 84 239

Adjournment.—If a court is in doubt as to whether the facts proved constitute an offence under the Army Act, they may adjourn and refer to the confirming officer in order to obtain from him a legal opinion. If a judge-advocate is present there will seldom be a necessity for taking such a course. R. 43 82

116. VOTING.—The opinion of each member of the court, commencing with the junior in rank, will be taken separately on each charge in succession. R. 42 R. 68

The president has no casting vote, and the opinion of the court must be decided by the absolute majority of the opinions of its members, all of whom are bound to vote. If the votes are equally divided the prisoner must be found 'not guilty.' 66 R. 68 S. 53

117. FINDING.—The finding must be recorded as 'guilty,' 'not guilty,' 'not guilty, and honourably acquit him of the same,' or a special finding may be made in certain cases. R. 43 Ap. II

118. 'NOT GUILTY.'—If a prisoner is found 'not guilty' of *all* the charges in the charge-sheet which is the subject of investigation, the president will date and sign the proceedings, the finding will be announced in open court, and the prisoner released in respect of those charges. S. 54 R. 44 134

The releasing of a prisoner on one charge-sheet does not prevent his being at once arraigned on another charge-sheet for another offence.

If a prisoner is found not guilty of some charges but guilty of others, it is not necessary to make public the finding of not guilty until the proceedings are duly promulgated.

If a prisoner be acquitted on *any* charge such acquittal shall not require confirmation, nor is it subject to alteration or revision. 136 S. 54 139

The particulars set forth in a charge may have been proved in evidence, but the court must find the prisoner 'not guilty' if they are of opinion that the facts proved do not disclose an offence under the Army Act. For example, a prisoner might be charged with conduct to the prejudice of good order and military discipline in doing certain acts. It may be clear the offence charged was committed, but if the court are of opinion that it was not one which is against 'good order and military discipline,' they should bring in a verdict of acquittal. R. 43

An officer, again, may be charged with behaving in a *scandalous* manner. If the court think that the offence proved is not *scandalous* in a military sense they must acquit, as in this word lies the whole essence of the charge.

When a court is in *doubt* as to whether the facts proved show that the prisoner is guilty of an offence under the Act, they must adjourn and refer the point to the convening officer.

When alternative charges are used a prisoner can only be found guilty of one of them, and 'not' guilty must be recorded against the others.

When a court is in doubt as to *which of the offences* the particulars proved do in law constitute, they may, 119 138

instead of adjourning, pass a *special finding*, and leave the legal point to be decided by the confirming officer.

Honourable acquittal.—Honourable acquittal should only be used in cases in which the charge affects the honour of the prisoner. If any part of the transaction which is tried is discreditable to the character of the prisoner the finding should not be used. The Duke of Wellington made some very strong remarks on the fact of an officer being 'honourably acquitted' of an affair which arose out of a quarrel at a brothel. Sm. 624

119. SPECIAL FINDINGS.—The most ordinary form of special finding occurs when the substance of a charge is proved but there is some discrepancy as to the particulars. An offence might be charged as having been committed in Dublin, while the evidence might show that it took place at the Curragh, and the finding should correct the error of place. A man, again, might be found guilty of a charge with certain exceptions, or guilty only of a portion of a charge—*e.g.*, a prisoner might be charged with making away with two pairs of boots while in evidence it may have been shown that one pair only is missing; or a prisoner may be charged with using certain insubordinate language, and the evidence show that the words uttered do not correspond with those in the charge. R. 43

On alternative charges.—If the prisoner is tried on alternative charges, and it appears to the court that the substance of the offence charged is proved but that it is not clear as to which charge the prisoner is legally guilty of, it is advisable to refer to the confirming authority for an opinion. The court may, however, pass a special finding, leaving the matter open to the confirming officer to decide under which charge the offence falls. R. 43 **217** **138** **148** Ap. II R. 54

Of insanity.—If a prisoner was insane at the time he committed the offence, or is insane when arraigned, a special finding to that effect is made, and such finding must be duly confirmed or else the trial is proceeded with either by the same or another court. S. 130 R. 56 **142**

Of cognate offences.—A man guilty of certain offences may be found guilty of other offences of a cognate character. A man charged with stealing or embezzlement may be found guilty of either, or of fraudulently misapplying the property in question. S. 56 182

A man charged with desertion, or attempting to desert, may be found guilty of either, or of absence without leave. 168

A man charged with an offence involving a certain punishment can be found guilty of the *same offence* when committed under circumstances *involving a less degree of punishment*. For instance, a man charged with committing an offence on active service can be found guilty of committing it not on active service. And a man charged with 'striking his superior officer in execution of his office' may be found guilty of 'striking his superior officer.'

Remarks.—A prisoner who is charged with a distinct offence under the Act cannot (with the above exceptions) be found guilty of another offence under any other section of the Act. For instance, an officer charged with 'behaving in a scandalous manner' could not be found guilty of 'conduct to the prejudice of good order and military discipline.' O'D. 144 181

Special findings refer as a rule to the *particulars* of a charge. The only description of special finding which affects the *statement of an offence* is (1) that allowed by section 56 of the Army Act, and (2) that alluded to in the latter part of Rule of Procedure 43 (F), with reference to alternative charges, in which the court is in doubt as to which offence the facts proved do in law constitute, and leave the legal point to be decided by the confirming officer. For example, a man is charged in the alternative with 'using insubordinate language to his superior officer,' and with 'conduct to the prejudice of good order and military discipline.' The court may find that the prisoner 'did . . . . , but doubt whether such facts constitute in law the offence stated in the first charge, or in the second charge, and therefore find him guilty of the offence in such one of those charges as the facts in law constitute.'

CHAPTER XV.

PROCEEDINGS BEFORE SENTENCE.

120. Reopening Court. 121. Evidence taken—Previous Convictions—Right of Prisoner. 122. Civil Convictions. 123. Prisoner's Character. 124. Trial of Officers and Warrant Officers. 125. Medical Certificate.

120. RE-OPENING COURT.—If the finding on a charge is guilty, the court re-opens and proceeds to take evidence for its guidance in determining the sentence. R. 45

The person who gives evidence should be the captain or other officer of the prisoner's troop or company, but it may be given by the adjutant or any other officer or even the prosecutor, but *not by a member of the court.* It is undesirable that a non-commissioned officer should give evidence. **68** Sm. 634

121. EVIDENCE TAKEN.—The evidence is produced in the form of a written statement which shows the number of regimental entries against the prisoner, his age, service, rank, the length of time he has been awaiting trial, the period of his confinement under a previous sentence (if any), and whether he is entitled to any pension or deferred pay or possesses any decoration or reward which can be forfeited by order of the court. R. 45 **205**

If the charge is for drunkenness, the number of times the prisoner has been drunk within the last twelve months and since enlistment must be added.

Previous convictions.—A schedule of convictions by a Ap. II.

civil court or court-martial is also produced (certified by the signature of an officer), and the witness is asked to identify the prisoner as the person referred to in the above statement and schedule, and to testify that the evidence given has been correctly taken from regimental records.

When the previous convictions against a prisoner are not recorded in the regimental books, a copy of a civil conviction certified by the clerk of the court, or a certified copy of the proceedings or part of the proceedings of a court-martial, is admissible as evidence. S. 164 S. 165

Right of prisoner.—The prisoner may demand that any statement made is compared by the court with that in the regimental books or a certified copy therefrom, and may call witnesses to rebut the evidence or cross-examine the witness producing it. R. 45

122. CIVIL CONVICTIONS.—A previous conviction by a civil court must of necessity be a conviction recorded against a man when serving *as a soldier*, whether the offence be committed in his present or in another corps, or while in a state of desertion or illegal absence. Any conviction against him as a civilian before his enlistment, or any conviction after his enlistment for an offence committed prior to his attestation, is not admissible. Q. xxii 65 **279** O'D. 145

123. PRISONER'S CHARACTER.—It is not now allowable to receive any verbal statement as to a man's bad character. The opinion of a man's character must be formed by the court from the number of regimental entries or convictions recorded against him, and from the examination and cross-examination of any witnesses to character which the prisoner may have previously called. **107**

The court may, however, obtain an opinion as to a man's good character if the prisoner does not produce such evidence on his own behalf.

124. OFFICERS AND WARRANT OFFICERS.—It is evident that the majority of the facts in the statement of particulars do not refer to either an officer or a warrant officer.

In the case of an officer it would be sufficient to ask a question as to the date of his army and regimental rank, so as to be able to sentence him to any loss of seniority of service, and previous convictions, if any, should be produced. Q. xxii 61 Sm. 627

The fact of an officer possessing medals or rewards would probably be brought forward in his defence, but if not the court might, if they think it necessary, ask a question on the point, as they have undoubtedly the power of sentencing a forfeiture of them. S. 44 P.W. 912

In the case of warrant officers, evidence should be taken as to their previous regimental rank, and any of the usual details in the statement which are applicable to the particular case.

125. MEDICAL CERTIFICATE. — Prisoners ordered for trial are medically examined on the morning of each day that the court sits, and commanding officers are responsible that no prisoner is brought before a court-martial if unfit to undergo his trial. A surgeon's certificate as to the state of health of the prisoner is usually laid before the court, but the court has no responsibility as to the effect of the sentence on the prisoner, and assumes that the prisoner is fit to take his trial unless the contrary be clearly shown. Q. vi 97

CHAPTER XVI.

THE SENTENCE.

126. AMOUNT OF PUNISHMENT—Common Errors—Character of Offence—Extenuating Circumstances. 127. VOTING ON SENTENCE—Nature of Punishment—Amount of Punishment. 128. COMMENCEMENT OF SENTENCE—Combined Sentence. 129. WORDING. 130. ONE SENTENCE. 131. JOINT TRIALS. 132. RECOMMENDATION TO MERCY. 133. REMARKS BY COURT. 134. FORWARDING PROCEEDINGS. 135. LOSS IN TRANSMISSION—Before Confirmation —After Confirmation.

126. AMOUNT OF PUNISHMENT.—In passing sentence courts-martial should be careful not to err on the side of too much severity. The proper amount of punishment is the least amount which meets the justice of the case and is necessary for the maintenance of discipline. Except with hardened offenders a short sentence is as likely to be effective as a long one. For the lesser class of offences usually dealt with by district courts-martial, and in the case of a first conviction, it will be rarely necessary to exceed three months' imprisonment. A district court-martial for any ordinary offence should not usually award more than six months' imprisonment. **193** Q. vi 99

Common errors.—The court must not fall into the common error of awarding a heavy sentence for the reason that the convening officer has sent the case for trial to a superior court. If a general court-martial consider that a prisoner's offence may be properly punished by a day's imprisonment, they should pass that O'D. 147

sentence and no more. When a prisoner has appealed to a court-martial from the award of his commanding officer he should not be punished for exercising his legal rights, and where the appeal was made in apparent good faith the prisoner should not be awarded a punishment exceeding that which could be given by the commanding officer. 51

Character of offence.—In the instance of offences against a superior, it should be remembered that the offence is committed in relation to the office held by the superior, and not in reference to him as an individual. The less the distance there is between the position and rank of the offender and the superior in question, the less serious will be the offence. Q. vi 72 159

Extenuating circumstances.—In addition to considering the actual offence, the character of the prisoner, and the extenuating circumstances, the court will have sometimes to take into consideration other matters, such as the prevalence of the crime at the time or a lax state of discipline in the corps of the offender. For the sake of its effect on the military body to which a prisoner belongs it will in some such cases be necessary to award a more severe punishment than would ordinarily be sufficient.

127. VOTING ON SENTENCE.—Every member must vote on the sentence, even although he may have given a previous opinion in favour of acquittal. A court-martial acts in the twofold capacity of judge and jury, and the court, having given their verdict as jurors, must act as a judge in awarding a punishment adequate to the offence of which the prisoner has been declared guilty. Every question in connection with the sentence must be decided by an actual majority, and in the case of equality of opinions the president has a casting vote. R. 68 66

Sentence of death cannot, however, be passed without the concurrence of two-thirds of the officers composing the court. S. 48

Nature of punishment.—When there is likely to be any difference of opinion as to the punishment to be inflicted, the court decides first as to its nature and secondly as to the amount. Sm. 641

The president puts before the court the most lenient species of punishment applicable to the case, and if that is not carried, one more severe, and so on.

Amount of punishment.—When the nature of punishment is decided on it is necessary to vote for the amount. The opinion of the members is taken seriatim, and then the president puts forward each opinion to be voted on, beginning with the most lenient.

It is always desirable that there should be some free discussion as to the sentence before the votes are taken, as otherwise the junior officers, whose opinion is first asked, may, from lack of experience, give either a foolish or mischievous vote.

128. COMMENCEMENT OF SENTENCE.—The sentence inflicted is deemed to commence from the date of the president's signature at the close of the proceedings. Care must be taken, therefore, that the proceedings are correctly dated and signed by the president and also by the judge-advocate, if there is any. Any delay caused by revision or confirming the proceedings is all to the benefit of the prisoner, as his punishment is already fixed, and may be mitigated but cannot be increased. 201 41 134 S. 54

When the prisoner before the court is undergoing punishment as the result of a previous award, the new sentence runs concurrently with the old one, and allowance must be made for the portion of the old sentence which is unexpired. Q. vi 100 S. 68

For example, a man has one month of unexpired sentence to undergo. The court wish to inflict three months' imprisonment. They will then sentence the prisoner to four months' imprisonment, as one of these months will run concurrently with the old sentence.

A court must not sentence a man to imprisonment 'to commence at the expiration of' or 'in addition to' another sentence which a prisoner is undergoing at the time of trial. The words are wholly inoperative, and it is easy to remember that *in all cases* the prisoner is liable only to the number of days' imprisonment specified in the sentence, counting from the date of the signature of the *original* proceedings. O'D. 151 S. 68 202

Combined sentence.—When the prisoner is undergoing imprisonment at the date the sentence is awarded, it must be remembered that the total amount of imprisonment resulting from the combined sentences must not exceed two years. S. 68 Q. vi 100

129. WORDING.—The sentence must be in accordance with the provisions of the Army Act, and should be worded as shown in the Appendix of the Act. S. 44

The sentence must fully describe the prisoner by number, rank, name, and regiment.

If a non-commissioned officer is being tried and has acting rank, such rank should be noticed in the charge-sheet, but no reference should be made to it in the sentence. 213

Terms of imprisonment not amounting to six months are to be awarded in days, and those of one or two years, in years. In all other cases the period is to be specified in months or months and days, each month being a calendar month and a year consisting of twelve such months. Q. vi 101 202

130. ONE SENTENCE.—Courts-martial award only one sentence in respect of all the offences of which a prisoner has been found guilty, and the sentence is deemed to be awarded in respect of any of the offences charged, and irrespective of whether the prisoner is tried on one or more charge-sheets. For instance, a man is charged with a second offence of fraudulent enlistment and also R. 47 R. 61

with drunkenness and theft. A sentence of penal servitude can be given, as it is justified by the first offence, although not applicable to the others if taken separately.

131. JOINT TRIALS.—When prisoners are jointly tried each is called on to plead and make his defence; hence the finding will be recorded separately for each prisoner. **101 218**

The sentence may also be recorded against each prisoner separately. If, however, the same sentence has been awarded to all the prisoners, there seems no objection to placing all the names together and sentencing them each to the punishment.

132. RECOMMENDATION TO MERCY.—When a court recommends a prisoner to mercy, the reasons for taking such a course should be given, and the recommendation is attached to the proceedings and promulgated with them. The number of votes by which the recommendation was adopted may be mentioned. S. 53 R. 48 **149**

It is the duty of a court-martial to award a sentence which is just and suitable to the circumstances of the case, and a recommendation to mercy will therefore be rarely necessary. Occasions for its use may, however, arise in the case of a peremptory punishment, such as cashiering, where the court has no option as to sentence.

Again, a court may, in the case of a very serious offence, feel bound to inflict a severe punishment, but at the same time may think that, under the special circumstances of the case, some mercy may, without injuring military discipline, be shown by the confirming officer, although not by themselves as judges of the case.

A court may also recommend a restoration of forfeited service, giving its reasons for so doing. S. 79 R. 48 **169**

133. REMARKS BY COURT.—If a court wishes to make any remark as to the conduct of the prosecutor, witnesses, or

any incidents connected with the trial, it should be embodied in a separate letter. The law as to libel is somewhat obscure, and there seems some doubt as to the extent to which the opinions uttered by a court would be privileged from an action at law. It is advisable that any remarks made should deal only with questions of fact immediately connected with the procedure of the trial.

134. FORWARDING PROCEEDINGS.—The proceedings are completed by the president signing and dating them. The judge-advocate, if present, also adds his signature, and they are forwarded without delay to the proper authority. A covering letter is at the same time sent when there appears occasion for it. R. 49 Q. vi 110 118 128

The proceedings of courts-martial are sent to the officer named in the order convening the court. R. 95

General courts-martial held at home are transmitted to the judge-advocate general; if held abroad, to an officer who has authority to confirm. Q. vi 108 73

District and regimental courts-martial are forwarded to the confirming officer, or, in the case of the former, to the officer specified in the order convening the court.

As a rule, certified copies of original documents, and not the originals themselves, are attached to the proceedings. Q. vi 9[illegible] 254

135. LOSS IN TRANSMISSION.—The judge-advocate, or, if there is not one, the president, is responsible for the custody of the proceedings. R. 94

If the original proceedings are lost they may be replaced by a certified copy. R. 98

Before confirmation.—If the proceedings have not been taken down in duplicate, and a copy is therefore not forthcoming, evidence may be taken, *with the consent of the prisoner*, as to the charge, finding, sentence, and transactions of the court, and such evidence may be accepted instead of the original proceedings and be confirmed.

If the proceedings have not been confirmed and there is no copy, and the prisoner refuses his consent to the above course, he may be tried again, and the previous proceedings are null and void.

After confirmation.—If the proceedings are confirmed and lost before promulgation, the charge, finding, sentence, and confirmation should be certified as correct by an officer who has had the lawful custody of the proceedings.

Promulgation can then take place in due course, and S. 165
the Secretary of State should be applied to for a warrant 149
to carry out the sentence.

CHAPTER XVII.

CONFIRMATION.

136. CONFIRMATION. 137. CONFIRMING OFFICERS—Not a Member—On board Ship—Trial of Marines. 138. POWER OF CONFIRMING OFFICER—Mitigation—Remission—Commutation. 139. REVISION—Only once—Absence of Members—Revising Finding—Revising Sentence. 140. IRREGULARITY IN PROCEEDINGS. 141. CONFIRMATION IN ERROR. 142. CONFIRMATION OF FINDING—Finding of Insanity. 143. NON-CONFIRMATION OF FINDING. 144. CONFIRMATION OF SENTENCE. 145. SENTENCE ON OFFICER. 146. SENTENCE OF DEATH AND PENAL SERVITUDE. 147. REMARKS OF CONFIRMING OFFICER. 148. OVERRULING OF CONFIRMING OFFICER. 149. PROMULGATION OF PROCEEDINGS—Forwarding of—Keeping of—Alteration in.

133. CONFIRMATION.—The procedure in military courts differs from that in civil in that the finding and sentence of the former have to be confirmed by an authority independent of the court. The interposition of a confirming authority before a sentence can be executed enables a further investigation of the case to be made by an unprejudiced person, affords a check against any rash or illegal exercise of power by a court, and tends to cause a merciful application of justice. The confirming officer is unbiassed by any local or personal prejudice, and is able to form an impartial opinion on the written evidence that comes before him.

The finding and sentence of a court-martial are not valid unless they be duly confirmed. S. 54 R. 50

Where there is no confirmation there is no trial and consequently no conviction, and the whole proceedings are null and void and no record of them is kept, and the prisoner can be tried again. 62 135 148

The only exception to this rule is the finding of acquittal on a charge, which does not require confirmation. 118

It is the province of a confirming officer to take care that the finding and sentence are legal, and to regulate the amount of punishment, and ensure that it is not greater than the interests of discipline and the merits of the particular case require. Q. vi 104

127. CONFIRMING OFFICER.—General courts-martial at home are confirmed by the Queen, those abroad by an officer deriving authority by a warrant either directly or indirectly from the Queen. He must be a field officer if one is available, but if not may be a captain. S. 54 S. 122

District courts-martial are confirmed by an officer holding a warrant to convene general courts-martial, or an officer (not below the rank of captain) to whom he has delegated power by warrant to convene and confirm district courts-martial. S. 123

Regimental courts-martial are confirmed by the convening officer, or by an officer who has authority to convene at the date of confirmation. S. 54

Not a member.—A member of a court-martial cannot confirm its proceedings, and when a member from his position becomes confirming officer, the matter must be referred to a superior. In the event of the case in question arising in a colony, and there being no military superior available, the Governor of the colony can himself confirm. 64

On board ship.—When a court-martial is held on board a ship not in commission, the proceedings can be confirmed provided there is a confirming authority on board who had the power to confirm at the port of embarkation. S. 188 57

When there is no such authority, confirmation takes place on disembarkation, in like manner as if the case had been tried at the place of landing.

When a regimental court-martial for the trial of a non-commissioned officer is held on board one of H.M.'s ships, the commanding officer of the troops will confirm, but the sentence cannot be carried out without the concurrence and order in writing of the captain of the ship. Q. xvii 73

Trial of marines.—In the case of the trial of a marine, the Admiralty have power to confirm general courts-martial or authorise by warrant an officer to confirm either general or district courts-martial. If no warrant is issued by the Admiralty, the proceedings are confirmed by the usual authority who would deal with the case of a soldier of the regular forces. S. 179

138. POWER OF CONFIRMING OFFICER.—On receiving the proceedings the confirming officer may confirm, partially confirm, refuse to confirm, or send back either finding or sentence or both for revision.

When confirming the proceedings he may mitigate, remit, commute, or delay the execution of the sentence. S. 57

He may also vary the sentence if it be informally expressed, and may refer the finding and sentence either wholly or partially to a superior authority. R. 55 S. 54

In some cases of special findings on alternative charges he will have to decide upon which charge the finding is to hold good. 119 148

Mitigation of a sentence means the awarding a less amount of the same species of punishment, and has the same effect as remitting a portion of the sentence. For instance, a sentence of forty-two days' imprisonment may be mitigated to one of twenty-one days.

Remission refers to the taking away of the whole or any portion of the punishment. Thus of a sentence of forty-two days' imprisonment with hard labour, the whole may be remitted, or twenty-one days of it, or the hard labour alone may be taken away.

Commutation is the changing of a punishment to one of less severity. A punishment laid down by scale can always be commuted to one lower down in the scale to 212 S. 44

which the offender might have been sentenced. Thus death may be commuted to penal servitude, or summary punishment to imprisonment.

139. REVISION.—When a confirming officer does not approve of either the finding or sentence he can order the court to reassemble for the purpose of revision.

The order directing the reassembly should contain the reasons why the confirming authority thinks a revision desirable, and should be embodied in a separate minute, which is read out to the court and attached to the proceedings.

Only once.—Revision can only be ordered once, and in no case must a confirming officer recommend the increase of a sentence or the revisal of a finding of acquittal. S. 54

When the finding or sentence is sent back for revision the court re-assembles in *closed court*, and considers the remarks of the confirming officer, but no further evidence can be taken. R. 51 S. 54

Absence of members.—If any member of the original court is unavoidably absent, the reason for his absence is stated and attached to the proceedings, and if the legal minimum of members is present the court can go on. If the president is unable to attend, the court must adjourn and report the fact, and the convening officer must, if possible, appoint the senior member to be president. **80** Ap. II S. 53 **67**

If the legal minimum of officers is not present, or if the president is absent, and it is impracticable to make the senior member take his place, revision is impossible, and the proceedings are returned to the confirming officer, who must then deal as he thinks fit with the original finding and sentence.

Revising finding.—When the finding is sent back for revision the court may adhere to their original finding and sentence, or alter either or both of them. They cannot revise a finding of acquittal on any charge, and if they revise any other finding, and such revision entails a sentence, they must re-write and pass the sentence afresh. R. 51

Revising sentence.—When the sentence is sent back for revision the court cannot revise the finding, nor *increase* the sentence originally awarded. S. 54

The proceedings after revision are dated and signed in the same manner as the original proceedings, and sent back to the confirming officer. R. 51

140. IRREGULARITY IN PROCEEDINGS. — When it appears to a confirming officer that the proceedings of a court-martial are illegal, he should direct the prisoner to be released and relieved of all the consequences of his trial, and all record of the trial is removed. If an irregularity has occurred in the proceedings which is simply of a technical character, and which does not affect the merits of the case, or lead to injustice being done to the prisoner, the proceedings may be confirmed, and the sentence should be mitigated if the confirming officer thinks that a reduction is necessary on account of the informality in question. Q. vi 107 62 148

Informality in the finding and sentence will, as a rule, be amended by sending back the proceedings for revision. A confirming officer may, however, vary the wording of an informal sentence, and if the sentence be in excess of that authorised by law, may reduce it to a legal amount and then confirm it. R. 55

This regulation would not be put in force unless revision was impracticable.

141. CONFIRMATION IN ERROR.—When a person not duly authorised confirms in error, it is still open to the proper authority to subsequently confirm, even although the proceedings are promulgated. O'D 155

When a punishment is inflicted on a prisoner in pursuance of the action of a confirming officer who is not duly authorised, that officer, having acted illegally, is liable to an action by civil law. Civil courts do not, however, interfere with errors in military procedure as

long as they are committed in good faith, but sometimes remedy mistakes as to jurisdiction. In 1844 the Governor of Sindh confirmed, without proper authority, a sentence of penal servitude on a soldier of the Bombay army. On appeal to the civil law the soldier was released on the ground that the Governor had no power to confirm.

142. CONFIRMATION OF FINDING ONLY.—When the finding of a court-martial is confirmed but not the sentence, or when both are confirmed and the sentence is wholly remitted, the record of conviction remains against the prisoner, and carries with it any penalties consequent on conviction. Q. vi 107 S. 79 P.W. 910

Finding of insanity.—If a court makes a special finding as to the insanity of the prisoner, it is forwarded for confirmation. If the finding is confirmed the prisoner is detained as an insane person during H.M.'s pleasure. If the finding is not confirmed the prisoner must be tried again by the same or another court. 119 S. 130 R. 56

143. NON-CONFIRMATION OF FINDING.—A court-martial through a misapprehension of the law may word their finding of guilty in such a manner that it virtually amounts to acquittal. In such a case the confirming officer should refuse to confirm, and direct the acquittal to be carried out. For instance, a soldier is charged with 'making a false accusation against another, knowing such accusation to be false.' The court finds that the prisoner is guilty of the charge, with the exception that the accusation was not false—which is virtually an acquittal.

When the confirming officer is of opinion that the court has improperly overruled a plea against its jurisdiction which has been raised by the prisoner in bar of trial, he should not confirm the finding, and the proceedings are annulled, and the prisoner (not having been legally tried at all) can be tried again. R. 34 Sm. 728 94 62

144. CONFIRMATION OF SENTENCE.—The sentence must be justified by the finding. If the finding is only partially confirmed, the sentence may have to be diminished so as to make the punishment legally consequent on the finding that is confirmed. R. 53

A court-martial may in respect of alternative charges make a special finding, and leave it to the confirming officer to decide on what charge that finding legally holds good. R. 43 R. 54

The confirming officer must decide on the legal point, and should remit or commute the sentence, if it is necessary, so as to be in accordance with the finding so declared.

145. SENTENCE ON OFFICER.—In certain cases special confirmation is required. 77

The sentence on a commissioned officer of death, penal servitude, cashiering, or dismissal, must be confirmed if in India by the Commander-in-Chief, if elsewhere by the Queen. Special powers of confirmation are sometimes given to the commander of an army in the field. 197

146. SENTENCE OF DEATH AND PENAL SERVITUDE.—All sentences of death (not on active service) and any sentence of penal servitude, *in respect of a civil offence*, which are passed in a colony must be sanctioned by its Governor. S. 54 200 S. 41

Sentences of death and penal servitude *in respect of civil offences* which are passed in India must receive the sanction of the Governor General or the Governor of a Presidency.

All sentences on active service and sentences of death and penal servitude in India and of penal servitude in the colonies, when passed on account of a *military offence*, do not require to be sanctioned by the civil authorities.

147. REMARKS OF CONFIRMING OFFICER.—Confirmation is effected by simply the word 'confirmed' in ordinary cases. A form of words to meet the various special cases is to be found in Appendix II. Ap. II

After the confirmation may be added any remarks on the trial the confirming officer may think fit to make, and these may be promulgated or not as he thinks most desirable. Q. vi 105

When, however, a confirming officer wishes to comment on a finding of acquittal or the inadequacy of a sentence, his remarks are not to be entered on the proceedings, but in the former case are to be embodied in a letter to superior authority, and in the latter to be forwarded to the members of the court in a separate minute, or published in orders. Q. vi 106 118

148. OVERRULING OF CONFIRMING OFFICER.—*After confirmation* the sentence may be mitigated, remitted, or commuted by the following officers, who must hold a command not inferior to that of the authority confirming the sentence :— S. 57 R. 125 212

Commanders-in-Chief, officers commanding the forces abroad, the Adjutant-General, and officers commanding districts.

If after confirmation some of the charges or findings are found to be invalid, the above authorities should take the invalidity into consideration and mitigate the sentence accordingly. R. 53

If, again, the sentence is found to be invalid, the above authorities may pass a valid sentence, which shall have the same effect as if passed by the court-martial. The punishment awarded must not be greater than that mentioned in the invalid sentence.

The fact of an officer having confirmed a court-martial does not prevent him exercising the power of remission, &c., after the proceedings are promulgated, provided that he is one of the authorities empowered to do so. The commanding officer who confirms a regimental court-martial is not one of the authorities specified, and therefore has no power after promulgation to alter the sentence.

It should be noted that if a *material illegality* is found *after* the proceedings are confirmed, the prisoner is relieved from all the consequences of his trial by order of the superior officer who reviews the proceedings, who would, in the case of a regimental court-martial, be the officer commanding the district, and, in the case of the higher courts, the judge-advocate general or his representative. Q. vi 107 62 74

When a special finding on an alternative charge has been confirmed, a superior authority may overrule that finding, and cause a finding in accordance with the other alternative to be recorded. The sentence should be remitted or commuted to suit such new finding. R. 54

Generally speaking, a permanent authority can do *after* confirmation everything that a confirming officer can do previous to it.

149. PROMULGATION OF PROCEEDINGS.—After confirmation the proceedings are forwarded to the commanding officer of the prisoner for promulgation. The charge, finding, sentence, confirmation, and any recommendation to mercy are usually read out on parade in the presence of the prisoner. R. 52 Q. vi 109 S. 53

The result of the court-martial is notified in the regimental orders, and occasionally in general or district orders, at the discretion of the superior authority.

Forwarding of.—The date of promulgation should be recorded on the proceedings, which are then forwarded with a covering letter. Q. vi 110

The proceedings of general courts-martial are forwarded by the judge-advocate to the judge-advocate general, and those of district courts-martial are sent to the staff officer of the district for transmission to the same authority. The proceedings of regimental courts are kept with the regiment until after the next general inspection, when they are forwarded to the depôt. Q. vi 111

Keeping of.—The proceedings of general and district courts-martial are kept in the judge-advocate general's office for seven and three years respectively, and those of the regimental courts-martial are kept at the regimental depôt for three years. Copies of the proceedings can be supplied on payment. **74** R. 96, R. 97

Alteration in.—No alteration can be made in the proceedings after promulgation. If an illegality is found to have been committed, justice can be secured by referring to those authorities who have power to alter the sentence after confirmation. S. 57 O'D. 155 **148**

CHAPTER XVIII.

CRIMES AND PUNISHMENTS.

150. OFFENCES PUNISHABLE BY MILITARY COURTS—With Death—Penal Servitude—Imprisonment—Cashiering or Imprisonment—Summary of exceptional Offences. 151. OFFENCES PUNISHABLE BY CIVIL COURTS. 152. OFFENCES OF RESERVE AND AUXILIARY FORCES.

150. OFFENCES PUNISHABLE BY MILITARY COURTS.—The various offences against military law, together with the maximum punishment that can be awarded for them, are described in detail in the Army Act of 1881, the Reserve Force Act of 1882, and the Militia Act of 1882, to which reference should be made in any particular case. In the following tables the crimes and their punishments are systematically grouped. 153 193

Offences committed by Persons subject to Military Law which can be punished by Military Courts.

Section	Headings	Crimes	Maximum Punishment
4	Offences in relation to the enemy	1. Shamefully abandoning post 2. Shamefully casting away arms 3. *Treacherously* holding correspondence with the enemy 4. Assisting or harbouring enemy 5. Voluntarily aiding enemy when a prisoner of war 6. Knowingly committing an act which imperils the success of the forces 7. Cowardly misbehaviour before enemy	Death
6	Offences committed *on active service* which are punishable more severely on active service than at other times *Otherwise cashiering or imprisonment*	1. Leaving commanding officer to plunder 2. Leaving guard or post without orders 3. Forcing safeguard 4. Forcing or striking sentinel 5. Impeding or refusing to assist provost-marshal 6. Using violence to bringer of supplies, or person, or property of inhabitants 7. Breaking into a place for plunder 8. *Intentionally* causing false alarms 9. *Treachery* about parole, watchword, or countersign 10. Irregularly appropriating supplies contrary to orders 11. Sleeps on, is drunk on, or leaves his post when a sentry	
7 12 8 9	Special offences	(*a*) Mutiny and sedition (*b*) Desertion (on active service) (*c*) Violence to a superior officer *in execution of his office* (*d*) *Wilful* defiance in disobeying the lawful command given *personally* by *superior officer in execution of his office*	

5	Offences in relation to the enemy	1. Leaving ranks without orders 2. Wilfully damaging property 3. Being taken prisoner through carelessness or disobedience, and not rejoining when able 4. *Without due authority* holding correspondence with enemy 5. Spreading reports calculated to alarm 6. Using words creating alarm or despondency	Penal servitude
8	Offences committed *on active service* which are punishable more severely on active service than otherwise *Otherwise cashiering or imprisonment.*	1. Violence, or threatening language to a superior officer 2. Disobedience to lawful command of a superior officer	
12 13	Offences punishable more severely for a second offence than a first *First offence—imprisonment.*	1. Desertion (not on active service). Second offence 2. Fraudulent enlistment. Second offence	
17	Offences in regard to public property	Embezzlement	
20	Offences in regard to a prisoner punishable more severely when wilfully committed *Otherwise—imprisonment.*	1. *Wilfully* releasing a prisoner 2. *Wilfully* allowing a prisoner to escape	

Offences committed by Persons subject to Military Law which can be punished by Military Courts.

Section	Headings	Crimes	Maximum Punishment
4	Offences in relation to the enemy	1. Shamefully abandoning post 2. Shamefully casting away arms 3. *Treacherously* holding correspondence with the enemy 4. Assisting or harbouring enemy 5. Voluntarily aiding enemy when a prisoner of war 6. Knowingly committing an act which imperils the success of the forces 7. Cowardly misbehaviour before enemy	Death
6	Offences committed *on active service* which are punishable more severely on active service than at other times *Otherwise cashiering or imprisonment*	1. Leaving commanding officer to plunder 2. Leaving guard or post without orders 3. Forcing safeguard 4. Forcing or striking sentinel 5. Impeding or refusing to assist provost-marshal 6. Using violence to bringer of supplies, or person, or property of inhabitants 7. Breaking into a place for plunder 8. *Intentionally* causing false alarms 9. *Treachery* about parole, watchword, or countersign 10. Irregularly appropriating supplies contrary to orders 11. Sleeps on, is drunk on, or leaves his post when a sentry	
7 12 8 9	Special offences	(*a*) Mutiny and sedition (*b*) Desertion (on active service) (*c*) Violence to a superior officer *in execution of his office* (*d*) *Wilful* defiance in disobeying the lawful command given *personally* by *superior officer in execution of his office*	

5	Offences in relation to the enemy	1. Leaving ranks without orders 2. Wilfully damaging property 3. Being taken prisoner through carelessness or disobedience, and not rejoining when able. 4. *Without due authority* holding correspondence with enemy 5. Spreading reports calculated to alarm 6. Using words creating alarm or despondency	Penal servitude
8	Offences committed *on active service* which are punishable more severely on active service than otherwise *Otherwise cashiering or imprisonment.*	1. Violence, or threatening language to a superior officer 2. Disobedience to lawful command of a superior officer	
12 13	Offences punishable more severely for a second offence than a first *First offence—imprisonment.*	1. Desertion (not on active service). Second offence 2. Fraudulent enlistment. Second offence	
17	Offences in regard to public property	Embezzlement	
20	Offences in regard to a prisoner punishable more severely when wilfully committed *Otherwise—imprisonment.*	1. *Wilfully* releasing a prisoner 2. *Wilfully* allowing a prisoner to escape	

Offences committed by Persons subject to Military Law which can be punished by Military Courts—continued.

Section	Headings	Crimes	Maximum Punishment
12 13	Offences punishable more severely for a second offence than a first . . *Second offence—penal servitude.*	1. Desertion (not on active service). First offence . 2. Fraudulent enlistment. First offence . . .	Imprisonment
14	Offence in relation to desertion	Persuasion of or connivance at desertion . . .	
18	Disgraceful conduct (of soldier)	1. Malingering, maiming, or aggravating disease . . 2. Theft or embezzlement . . . . . . 3. Fraudulent or unnatural crimes	
20	Offence in relation to a prisoner not wilfully committed . . . . *If wilfully committed—penal servitude.*	1. Without proper authority releasing a prisoner . . 2. Without reasonable excuse allowing a prisoner to escape	

23	Offences in relation to supplies	Dealing corruptly in regard to sutlers or supplies to the forces	Imprisonment
24	Offences as to equipment of soldier	1. Losing by neglect, or making away with any article of his kit, or equipment, or making away with his medal 2. Ill-treating his horse 3. Wilfully injuring public, regimental, or soldiers' property	
25	Offences in relation to false documents, declarations, and statements	1. Knowingly making false returns or reports 2. Fraudulently making away with documents 3. Making false declarations officially 4. Making false accusations 5. Making false statements when complaining 6. False confession of desertion (soldier) 7. False statements to get furlough (soldier)	
27			
29	Perjury	Perjury	
33	False answers on enlistment	Wilful false answers to attestation questions before justice	
32		1. Fraudulent enlistment of a man discharged from the service in disgrace 2. Improper enlisting of a man 3. Violating regulations as to enlistment and attestation	
34	Offences as to enlistment		

Offences committed by Persons subject to Military Law which can be punished by Military Courts—continued.

Section	Headings	Crimes	Maximum Punishment
6	Offences committed *not on active service* which are punishable more severely on active service than at other times *On active service—death.*	Crimes: *vide* s. 6 and *ante*, p. 106	Cashiering in case of an officer; imprisonment in case of a soldier
6 (2)	Offences in respect of military service . .	1. *Negligently* causing false alarms . . . . . 2. Without good excuse making known watchword .	
8 9	Offences committed *not on active service* which are punishable more severely on active service than at other times . . . *On active service—penal servitude.*	1. Violence or threatening language to a superior officer 2. Disobedience to lawful command of a superior officer	
10	Minor cases of insubordination and disobedience .	1. Being concerned in a fray, resists arrest . . . 2. Resisting against lawful custody . . . . 3. Breaking out of barracks (soldier) . . . . 4. Neglect of orders	
11	. . . . .		
15	Absence from duty without leave	1. Absence from parade or without leave . . . 2. Absence beyond garrison limits or from school (soldier)	
16	Scandalous conduct of an officer	Behaving in a scandalous manner unbecoming the character of an officer and gentleman (peremptory punishment)	

19	Drunkenness	Drunkenness on or off duty	Cashiering in case of an officer; imprisonment in case of a soldier
21	Offences in relation to a prisoner	1. Unnecessarily detaining a prisoner	
22		2. Not reporting committal of prisoner within twenty-four hours	
		3. When on guard not reporting as to prisoner within twenty-four hours	
		4. Escaping or attempting to escape from lawful custody	
26	Offences in regard to returns	1. Signing returns in blank	
		2. Refusing to make returns	
28	Offences in relation to courts-martial	Refusing to attend, take the oath, produce documents, answer questions, and every contempt of court	
30	Offences in regard to billeting and impressment of carriages	*Vide* Act	
31			
35	Disloyalty	Using traitorous or disloyal words	
36	Injurious disclosures	Injuriously disclosing movements, &c., of H.M.'s Forces	
37	Ill-treating soldiers (by officers and non-commissioned officers)	1. Ill-treating soldiers	
		2. Unlawfully detaining pay	
38	Duelling and suicide	1. Fighting a duel	
		2. Attempt at suicide	
39	Refusing to aid civil power	Refusing or neglecting to aid the civil power	
40	Conduct to the prejudice of military discipline	Any act to the prejudice of good order and military discipline not specially mentioned in this Act	

NOTE.—A court-martial can try all civil offences committed by persons under military law, subject to certain restrictions as to treason, treason-felony, murder, manslaughter, and rape. (S. 41.)

Summary of Offences exceptionally treated by Military Courts.

Section	Summary of Offences	How dealt with—Maximum Punishment
8	Violence to superior officer *in execution of his office*	Death.
	Violence, or using threatening or insubordinate language to superior officer	(*a*) On active service—penal servitude. (*b*) Otherwise cashiering or imprisonment.
9	*Wilful* defiance in disobeying the lawful command given *personally* by superior officer *in execution of his office*	Death.
	Disobedience to lawful command, given by superior officer	(*a*) On active service—penal servitude. (*b*) Otherwise cashiering or imprisonment.
12	Desertion	(*a*) On active service—death. (*b*) Otherwise { 1st offence, imprisonment. 2nd offence, penal servitude.
13	Fraudulent enlistment	1st offence, imprisonment. 2nd offence, penal servitude.

16	Scandalous conduct of an officer . .	Peremptory punishment; must be cashiered.
19 44 46	Drunkenness	Drunkenness *not on duty* is to be punished summarily by commanding officer, if there are not more than 3 former instances in the previous twelve months. For the 5th, and from the 5th to the 8th offence in a year it is optional to bring a soldier to court-martial. For the 9th and subsequent offences in a year he should be tried. Drunkenness *on duty* is punished either summarily or by court-martial for the first offence, and renders a soldier liable to summary punishment on active service.
20	Releasing or otherwise permitting the escape of a prisoner	If wilfully done—penal servitude. If otherwise—imprisonment.
28	Contempt of court	(1) The offender to be tried by *another* court, and suffer cashiering or imprisonment. (2) If the offender creates a disturbance, he may be summarily sentenced to 21 days' imprisonment by order of the original court.

151. *Offences against the Army Act which can be punished by Civil Courts.*

Section	Heading	Crimes	Maximum Punishment
98	Offences against enlistment	1. Unlawful recruiting or improper interference with recruiting	Fine of 20*l.*
99		2. False answer on attestation . . .	Three months' imprisonment.
109	Offences in relation to billeting	1. Improperly billeting, neglecting or refusing to properly billet, or receiving bribes in the matter (Of constable.)	Fine of 10*l.*
		2. Refusing to billet, or giving bribes to escape billeting (Of innkeeper.)	Fine of 5*l.*
119		3. Refusing to pay for billets, or damaging innkeeper's property . . . . (By officer or soldier.)	Must pay the amount with costs if brought before civil court.
111		4. Offences against billeting mentioned in in S. 30 (Of officer or soldier.)	Fine of 50*l.*

116	Offences in relation to impressment of carriage	1. Improperly impressing carriage, refusing to properly impress carriage, or receiving bribes in the matter (Of constable.)	Fine of 20*l.*
117		2. Refusing to furnish carriage, or giving bribes to escape impressment (Of innkeeper.)	Fine of 10*l.*
119		3. Refusing to pay for carriage or damage in respect of carriage impressed (Of officer or soldier.)	Must pay the amount with costs if brought before a civil court.
118		4. Offences against impressment mentioned in s. 31 (Of officer or soldier.)	Fine of 50*l.*
121		5. Fraudulent claim as to billeting or impressment	Three months' imprisonment or 5*l.* fine.
126, 129	Offences in relation to proceedings of court-martial	Contempt of court or perjury before a court-martial (By civilian.)	Such punishment as the civil court dealing with the offence can award for it, if committed against itself.

Offences against the Army Act which can be punished by Civil Courts—continued.

Section	Heading	Crimes	Maximum Punishment
142	Offences as to personation	Falsely personating a man belonging to the forces	Three months' imprisonment or 25*l.* fine.
143	Offences as to tolls .	Improperly demanding and receiving tolls from soldiers	Fine of 5*l.*
152	Offences in relation to desertion	1. False confession of being a deserter . .	Three months' imprisonment.
153		2. Inducing or assisting a soldier to desert .	Six months' imprisonment.
155	Miscellaneous offences .	1.[1] Trafficking in commissions, promotions, or exchanges	Six months' imprisonment or 100*l.* fine.
156		2. Buying from or assisting a soldier to make away with his equipment or kit	1st offence, 20*l.* fine and treble value of property; 2nd offence, fine as before or six months' imprisonment.

[1] An officer who is convicted of this offence by a court-martial can be dismissed the service.

Crimes and Punishments peculiar to the Reserve and Auxiliary Forces, and punishable by the Army Act, the Reserve Force Act, or the Militia Act, according to circumstances.

152. *Vide* paragraphs 58, 61, 162, 164–166, 171–173, 177, 179, 180, 206, 209.

Offences of persons who may or may not be subject to Military Law	Crime	Maximum Punishment
R. F. A. 15. Offences of men of the army and militia reserve	1. Desertion, in failing to appear when called out on permanent service or in aid of civil power 2. Absence without leave, in failing to appear when called out on permanent service or in aid of civil power, or when called out for training	By military courts the punishment authorized by A. A. for like offence.
M. A. 23. Offences of militia men	1. Desertion in failing to appear when assembled for embodiment 2. Absence without leave in failing to appear when assembled for embodiment or training	
R. F. A. 6. Offences of men of the army reserve	1. Failing to comply on two consecutive occasions with orders referring to payment of reserves 2. Failing to attend at any place when duly ordered 3. Failing to comply with orders issued by virtue of R. F. Act 4. Being insubordinate to a military official who is carrying out provisions of R. F. Act 5. Fraudulently obtaining pay or allowances	By civil court, fine of 25*l.* or imprisonment for its non-payment

Crimes and Punishments peculiar to the Reserve and Auxiliary Forces, &c.—continued.

Offences of persons who may or may not be subject to Military Law	Crime	Maximum Punishment
M. A. 26. Offences of militiamen	Fraudulent enlistment or false answer on attestation in enlisting in auxiliary or reserve forces, or Royal Navy . .	By military courts the punishment authorised for like offence By civil courts fine of 25*l.* or imprisonment for its non-payment, or imprisonment for 3 months for 1st offence, 6 months for 2nd offence
M. A. 26. Offences of men of the reserve and auxiliary forces (other than militia) and Royal Navy	Fraudulent enlistment or false answer on attestation in enlisting in Militia .	
M. A. 26. Offences of men of the reserve and auxiliary forces and Royal Navy	Attempt to commit above offences of fraudulent enlistment and false answer on attestation	By military courts imprisonment By civil courts half the usual penalty
M. A. 10. Offences of militia men	1. Enlisting in militia after having been discharged with ignominy from her Majesty's service . . . . 2. Offences against enlistment laws of militia	By military courts punishment authorised for like offence By civil courts six months' imprisonment
M. A. 24, 25; R. F. A. 16, 17. Offences of any person	False confession of being a deserter or absentee from militia or reserve forces Inducing or assisting a man to absent himself from militia or reserve forces	By civil court three months' imprisonment By civil court fine of 20*l.*

CHAPTER XIX.

CRIMES.

153. CLASSIFICATION OF OFFENCES. 154. FORCING A SAFEGUARD. 155. MUTINY—Limitation as to Trial. 156. INSUBORDINATION. 157. SEDITION. 158. VIOLENCE TO A SUPERIOR—Superior Officer—Offer of Violence—Execution of his Office. 159. INSUBORDINATE LANGUAGE. 160. DISOBEYING LAWFUL COMMAND—Lawful Command—Military Command.

153. CLASSIFICATION OF OFFENCES.—In the first part of the Army Act, which treats of discipline, are enumerated the offences which are triable by military courts. The principle of classification adopted is fully explained in the preamble to the Army Discipline Act of 1879, and consists in grouping together offences of a similar character, and ranging the various groups as between themselves in a manner intended to impress the soldier with their relative importance. For example, the Act begins with the punishment of 'offences in respect of military service' (ss. 4–6), on the ground that misbehaviour in the field is the greatest crime that a soldier can commit. This is followed by 'mutiny and insubordination' (ss. 7–11), by way of showing that after misbehaviour in the field mutiny and insubordination rank next in order amongst a soldier's crimes.

The above headings are followed by—

Desertion, fraudulent enlistment, and absence without leave (ss. 12–15);

Disgraceful conduct (ss. 16–18);

Drunkenness (s. 19);
Offences in relation to prisoners (ss. 20–22);
Offences in relation to property (ss. 23, 24);
Offences in relation to false documents and statements (ss. 25–27);
Offences in relation to courts-martial (ss. 28, 29);
Offences in relation to billeting (s. 30);
Offences in relation to impressment of carriages (s. 31);
Offences in relation to enlistment (ss. 32–34);
Miscellaneous military offences (ss. 35–40);
Offences punishable by ordinary law (s. 41).

The majority of the offences require no comment beyond that afforded by the notes appended at the end of each section in the Army Act. Some of the crimes, however, require a more detailed notice, which is here given.

154. FORCING A SAFEGUARD.—Up to 1829 the forcing of a safeguard was punishable by death without alternative. The term safeguard has been differently interpreted, but for the purposes of this section it may be defined to be a party of soldiers who, in time of hostilities, are detached to protect certain properties or persons from harm being done to them either by marauders or soldiers. Any soldier of such party when in the performance of this duty is a part of the safeguard, and to force him is as criminal as to force the whole party. S. 6 Sm. 204

In 1811 the Duke of Wellington placed safeguards in certain villages in Spain to prevent his troops from pillaging them. In the invasion of France in 1870 the Prussians protected the châteaux of some of their friends in a similar way. Ho. 184

155. MUTINY implies collective insubordination, and the resisting *military* authority in combination or simulta- S. 7 Sm. 170

neously. A man by himself cannot mutiny, as it is essentially a joint act. At the same time a man might be charged singly with failing to inform his commanding officer of a mutiny, or with endeavouring to seduce a soldier from his allegiance.

Limitation clause.—A man can always be tried for mutiny irrespective of the amount of time which has elapsed since the commission of the offence, or of the fact that he has ceased to be subject to military law. S. 158 S. 161 58

156. INSUBORDINATION is the mutinous act of an individual. Several prisoners may be charged with insubordination committed at the same time and place. This, however, does not constitute mutiny, which manifests itself when there is a *combined intention* to rise against military authority.

157. SEDITION is similar to mutiny, but is directed against the civil authorities. It consists in acts of a treasonable or riotous nature against constituted authority or the public peace.

Sedition covers a far greater variety of offences than mutiny, and includes all tumultuous or disorderly demonstrations which have a mutinous tendency.

In the case of mutiny there must be proof of direct resistance or disobedience, or intention to carry out acts which would lead to them. Sedition would refer to acts which do not go quite so far.

'For instance, each one of a number of men going in a body to a superior in a menacing manner in order to induce him to release a prisoner or mitigate his punishment, joins in sedition.' O'D. 33

158. VIOLENCE TO A SUPERIOR. — Using or offering violence to a superior in execution of his office is so S. 8

grave an offence that the meaning of the words constituting it require exact definition.

The term *superior officer* includes all non-commissioned officers and any soldier temporarily and necessarily placed in an equivalent position of authority. A soldier told off to march a party off parade would not be a superior officer, as he is simply acting as the senior of his grade, but if he was placed in temporary charge of a guard he would be deemed one. It should be clearly proved in the evidence that the offender knew that the person who was the subject of the offence was his superior officer. S. 190

'*Offer of violence*' implies any threatening act or gesture amounting to an attempt to use violence.

It must be clear that the attempt, if not prevented, would in reasonable probability lead to an act of violence.

If a man makes threats or uses threatening gestures, and there is no apparent probability of his being able to carry out his intention, he could not be charged with an offer of violence, but would be tried either for using threatening or insubordinate language or under S. 40.

A soldier shaking his fist at an officer on parade out of an upper-story barrack-room window would not be guilty of an offer of violence, as there is no probability of his being able to carry out his threat. If, however, a soldier aimed at an officer with a loaded rifle, or if he made an unsuccessful attempt to strike him in an orderly-room, he might be charged with offering violence.

When a soldier commits an insulting or insubordinate act, which does not amount to an 'offer of violence,' such as throwing down his arms on parade, or throwing away his cap when coming out of an orderly-room, he would usually be charged with the 'threatening or insubordinate language' he used, and the acts or gestures would be circumstances that might lead the court to inflict a more severe punishment. If, however, no language was used that could be charged under this section, the offender would be tried on a charge of conduct to the prejudice of good order and military discipline. S. 40

'*Execution of office.*'—The fact that the insertion of this expression in a charge of offering violence to a superior renders the offender liable to punishment of death makes it expedient that the charge should not be so worded if there is any doubt as to the superior being in execution of his office. Sm. 174, 175

It is somewhat difficult to define the exact term. It is clear that an officer in uniform, or a non-commissioned officer, in or about a military quarter is in execution of his office when he exercises his ordinary duties of military command and supervision.

An officer in plain clothes may or may not be in execution of his office. When doing duty with troops he would be so considered, provided the offender had reasonable cause to know that he was an officer, and this would have to be proved in evidence.

'Two soldiers met an officer in plain clothes in the dark and assaulted him; he then ordered them to desist, stating that he was Lieut. —— of the Royal Artillery (the soldiers belonging to a line regiment in the same garrison), whereupon they said they did not care, and continued to assault him.' The officer was held to be in execution of his office, as the soldiers had reasonable cause to believe that he was an officer from his statement. O'D. 36

An officer on leave in plain clothes would only in very exceptional cases be deemed in execution of his office.

Again, the mere fact of being in uniform does not of itself imply that a superior is always on duty. For instance, in the social intercourse of officers or non-commissioned officers among themselves, cases might arise where violence was offered to a superior, and the circumstances would not justify the conclusion that he was in a position to exercise military command, and therefore in execution of his office. Similarly a non-commissioned officer would clearly not be in execution of his office when committing an illegal act such as a felony.

It is not necessary, however, that a superior should be actively discharging military duty. Thus a corporal who

was asleep in a barrack-room of which he had charge, and was then assaulted, was held to be protected by this section.

159. THREATENING OR INSUBORDINATE LANGUAGE.—The language used must be in substance and effect recounted in the charge. In order to charge a man under this section it must be clear that the words were deliberately used with the intention to be insubordinate and resist authority. Due regard must be paid to the actual circumstances of the case, and a hasty or angry expression, or language used by a man when drunk which he would not probably employ if sober, or expressions made use of by a man when on his defence before a military tribunal, should not be thus charged, but if necessary punished under Section 40. S. 8

In all insubordinate acts it should be kept in mind that the greater the distance in position between the offender and the superior, the greater will be the offence. Language which, used by a soldier to a non-commissioned officer, might be merely disrespectful, might, if used to an officer, be treated as insubordinate. Q. vi 72 126

Insubordinate language must be addressed *to* the superior officer, or in such a manner that he is intended to hear it. Insubordinate or disrespectful language about a superior would be treated under other clauses, and generally under S. 40. S. 40

160. DISOBEYING LAWFUL COMMAND.—In order to convict under the most serious of the charges in this section it must be clearly proved that the superior was in execution of his office, that the command was *lawful*, that it was delivered *personally*, and that it was disobeyed under circumstances showing a wilful defiance of authority. S. 9

'*Lawful command.*'—There has always been a good

deal of discussion as to what is meant by a lawful command. It appears, however, undisputed—

(1) That the command is to be given by a superior who has the right to do so.

(2) That it refers to some matter connected with military duty, and is, in fact, a military command.

(3) That it is not contrary to civil law, and is justified by military law and custom.

'So long as the orders of a superior are not obviously and decidedly in opposition to the well-known and established customs of the army and laws of the land, or if in opposition to such laws do not tend to an irreparable result, so long must the orders of a superior meet prompt, immediate, and unhesitating obedience.' Sm. 595

No excuse as to religious scruples is any justification for refusing to obey an order. An officer cannot refuse to pay respect to what he considers a heathen ceremonial by not presenting arms, if he is given an order to do so. Nor can an officer refuse to attend with his men any form of worship at which he may be ordered to be present in the usual course of military duty.

Military command.—It is difficult to lay down exactly the limits of a strictly military command. It should be quite clear, in order to charge a man under this section, that the refusal to obey the command in some way interferes with a public military duty.

O'Dowd gives a good illustration of a lawful military command for the purposes of this section. An officer going on military duty orders a soldier to fetch his horse. Disobedience to such an order would render the soldier liable under this section. If, however, the officer wanted his horse to go out hunting or to take an ordinary ride for pleasure, refusal to bring it could not be treated as disobedience to a lawful command, although, of course, the soldier might be otherwise punished. O'D. 47

CHAPTER XX.

CRIMES—(continued).

161. DESERTION—Judged by Time—Judged by Distance—Limitation as to Trial. 162. OF MILITIA AND RESERVE MEN. 163. DESERTION ON FURLOUGH. 164. ATTEMPTING TO DESERT—Persuading to desert—Assisting to desert. 165. CONFESSION OF DESERTION—False Confession. 166. REPEATED OFFENCES. 167. PROOF OF DESERTION. 168. VARIATION IN FINDING. 169. PENALTIES ON CONVICTION—Forfeitures—Stoppages—Restoration of Service. 170. PROCEDURE AS TO DESERTERS. 171. FRAUDULENT ENLISTMENT—Attempt at—Man discharged with Ignominy. 172. FALSE ANSWER ON ATTESTATION—Attempt at—Of militia man. 173. REPEATED OFFENCES. 174. LIMITATION AS TO TRIAL. 175. REMARKS—Confession of Fraudulent Enlistment—False Confession—Penalties on Conviction—Restoration of Service. 176. ABSENCE WITHOUT LEAVE—On Furlough—At Election Time. 177. OVER TWENTY-ONE DAYS—Not Desertion. 178. UNDER TWENTY-ONE DAYS. 179. ABSENCE FROM MILITIA OR RESERVE—Assisting a Man to absent himself. 180. TRIAL BY CIVIL COURT.

161. DESERTION is constituted when a man absents himself with the *intention* either of not returning to the service, or escaping some important service, such as active or foreign service. It may be defined as 'illegal absence from duty without the intention of returning.' S. 12 **150**

The crime of desertion was recognised by the civil law and punished as a felony before the passing of the first Mutiny Act brought a more speedy method of dealing with it into action.

The various Mutiny Acts authorised a maximum penalty of death for the offence, and finally the Army Act provided a punishment in accordance with the conditions under which the desertion was committed—*i.e.* death, penal servitude, or imprisonment, according to circumstances.

Judged by time.—The length of *time* a man is absent has nothing to do with desertion. Cases have occurred where a lengthy absence was obviously involuntary and the offender had no intention of leaving the service. For instance, a corporal of an English battalion serving in Canada was virtually kidnapped and made to serve as a soldier during the war in the United States between North and South, and was unable to get back to his regiment till after the close of the war. Again, a gunner at a seaport town in England drifted out to sea in a small boat and was carried to Australia in an outward-bound ship, and was unable to get back for many months.

On the other hand, a soldier who was only a few hours absent might be arrested in plain clothes on board a ship bound for a foreign country, and it would be quite clear that he intended to desert.

Judged by distance.—Neither can desertion be invariably judged by *distance*. 'A soldier may absent himself and depart to a very considerable distance, but the intention to return may be clear, whereas he may scarcely quit the camp or barrack-yard and the evidence of desertion may be complete—as if a soldier were detected in passing through the outposts clandestinely, or crossing a frontier, or being taken in disguise with letters on his person indicating his intention. The perpetration of any heinous crime, coupled with absence without leave and the forcible capture of the offender—though the absence be of short duration and the distance inconsiderable—may lead to the belief that the prisoner had no intention of returning.' Sm. 183

A man who hides himself at the time his regiment is embarking for foreign service can be tried for desertion,

as his intention to evade this important service is apparent.

Limitation clause.—A man can always be tried for desertion *on active service* irrespective of the amount of time that has elapsed between the commission of the offence and the arraignment of the prisoner. For desertion *not on active service* a man can similarly be always tried, except when he has served, after committing the offence, three years continuously in an exemplary manner before the charge is made against him, in which case he is not liable to trial. S. 158 S. 161 58

A civil court cannot try a man for deserting from the regular forces, as the Acts referring to this offence were repealed in 1863. In certain cases, however, men of the reserve forces and the militia are amenable to civil law. 61 152

162. DESERTION—MILITIA AND RESERVE.—Men of the Reserve and Auxiliary Forces are of course liable for trial for desertion when their corps or they themselves individually are subject to military law. 18

A militia man, whether otherwise subject to military law or not, can be tried for desertion for failing to appear when the militia is assembled for embodiment, and a man belonging to the reserve forces is similarly liable to trial when he is called out either on permanent service or in aid of the civil power. M.A.?? R.F.A. 15

In both cases they can if necessary be tried by a civil court, and be sentenced to a fine not exceeding 25*l.*, or imprisonment in lieu thereof. 61 152

163. DESERTION ON FURLOUGH.—Discussion has more than once taken place as to the possibility of a man deserting *while on furlough*. It is clear that a man is still under orders when on furlough, and is liable to be called on to rejoin at any moment. Hence, if he commits any act, such as disguising himself or going where orders Q. xiii 56

cannot reach him, he shows an intention of quitting the service; and if a man acts so that orders cannot reach him, he illegally absents himself from the place in which he ought to be.

The common example given is that of a soldier on furlough who is found on board an outward-bound ship with a passenger ticket. According to the above reasoning he might be tried for desertion, but it will always be in the power of the court, if they hold an opposite view, to convict the prisoner of the similar offence of attempting to desert. S. 56

164. ATTEMPTING TO DESERT is punishable to the same extent as desertion. To prove desertion it is necessary to show the absence without leave and the intention not to return. Cases of attempting to desert will arise when the intention is evident but the absence does not occur. For instance, a man might be caught in plain clothes attempting to slip past a sentry, or a case might occur in which a man had made arrangements to disguise himself and had taken a ticket by rail or otherwise to a distant place. S. 12

The evidence should be sufficient to prove that the carrying out of the *attempt* with which the prisoner is charged would lead to his desertion.

Persuading to desert.—Persuading or endeavouring to persuade a man to desert is punishable to the same extent as desertion. S. 12

Assisting to desert.—Assisting or conniving at desertion is a lesser offence. In this case a man must actually have deserted or attempted to desert before the assistance was given or connivance made. S. 14

Any person persuading or assisting a soldier or a man of the army or militia reserve or a militia man to desert is liable to imprisonment by a civil court for a term not exceeding six months' hard labour. S. 153 R.F.A. 17 M.A. 25

165. CONFESSION OF DESERTION.—A soldier confessing desertion or fraudulent enlistment may have his trial dispensed with by competent military authority, and that authority may award any or all of the deductions from pay which a court-martial could under the same circumstances award, and the offender necessarily suffers all the forfeitures which result from a conviction of desertion. An entry of the order is made in the regimental books as if the soldier had been convicted by court-martial. S. 73 S. 138 Q. vi. 152

If a soldier makes a confession, when serving, of desertion or any offence against enlistment, and the evidence is not at once forthcoming, he may be ordered to continue at his duty till it arrives instead of being taken into custody. A record of the confession, signed by him, is kept, and the matter reported to the proper authority. S. 73 Q. vi 28, 131 170

If a person not serving confesses that he is a deserter, he is taken into military custody if he surrenders himself to his own corps, or if he gives himself up in uniform at a military station. In all other cases he must be handed over to the civil power and duly committed before being taken into military custody. Q. vi. 128

False confession.—Any person who falsely represents himself to be a deserter from the army, or a deserter or absentee from the militia or reserve forces, shall, on summary conviction by a civil court, be sentenced to imprisonment not exceeding three months. S. 152 M.A. 24 R.F.A. 16

If a soldier subject to military law makes a false statement to his commanding officer as to desertion or fraudulent enlistment, or as to serving in or discharge from any of H.M. forces, he can be tried for the offence by court-martial. S. 27

166. REPEATED OFFENCES.—For both the offences of desertion and fraudulent enlistment the higher punishment of penal servitude can be awarded if the offence is committed for the second time. Several charges can be S. 12 S. 13

dealt with when the prisoner is arraigned, but each separate charge, whether of desertion or fraudulent enlistment, should be in a separate charge-sheet.

When a man is tried on one or more charges of desertion, the similar offence of fraudulent enlistment may be reckoned as a previous offence, and render the offender liable to the higher penalty.

For the purposes of trial, a man charged with either of the above offences is deemed to belong to any one or more of the corps to which he has been transferred or appointed.

Men of the militia become liable to the higher penalty on commission of these offences for a second time. M.A. 43 173

167. PROOF OF DESERTION.—The mere fact of a man surrendering himself is not a proof that he did not intend to desert. It is quite possible that he might have surrendered from changing his mind or from finding it impossible to effect his escape. O'D. 54

When a soldier pleads to a charge of desertion it should be made clear to him that the question of *intention* is the substance of the charge, and that the court are considering something more than his illegal absence. Soldiers commonly think that the crime alleged against them is mainly in reference to their illegal absence, and thus plead to a wrong issue. 177

The ordinary proofs which would satisfy a court as to a man's intention to desert are his having expressed an opinion to that effect, being found without proper cause in plain clothes or in disguise, having taken a passage to a distant place, absconding after commission of a serious crime, being found in hiding, having made arrangements for sale of his property, &c.

Fraudulent enlistment is an offence allied to desertion not on active service, and is similarly punished. Formerly, a man who absented himself from his corps and fraudulently enlisted in another regiment could be tried

for desertion, but now it is held he cannot, as his intention to serve is evident. If, however, a man fraudulently enlists in a regiment for the purpose of escaping foreign service he is liable to be charged with desertion.

168. VARIATION IN FINDING.—A prisoner charged with desertion may be convicted of attempting to desert or of absence without leave, and a prisoner charged with attempting to desert may be found guilty of desertion or absence without leave. When there is any doubt as to the intention not to return being sufficiently proved, the prisoner should be given the benefit of it and found guilty of the minor charge. S. 56 119

169. PENALTIES ON CONVICTION.—A soldier convicted of desertion or fraudulent enlistment, or who confesses those offences and has his trial dispensed with, necessarily forfeits, counting from the date of conviction or order dispensing with trial:— S. 79 S. 73 Q. vi 153

Forfeitures.—All prior service towards discharge and advantages accruing therefrom as to pension, all good conduct pay and deferred pay, together with any medals, annuities, and gratuities. He also forfeits *all* pay during the time of his absence, and while under detention pending trial, and is further liable to general service anywhere, either wholly or partly in commutation of his punishment, as the competent military authority may direct. P.W. 577, 649, 910, 931, 766 S. 83 206

Stoppages.—The only additional stoppages which could be inflicted by a court-martial or competent authority are any of the penal deductions which are applicable to the case—such as stoppages to make good loss of kit or necessaries or any damage. Q. vi 150

Restoration of service.—Forfeited service may be restored by order of the Secretary of State, or by recommendation of a court-martial, on account of good and S. 79 Q. xix 76, 99

gallant conduct in the field or by reason of having no entries recorded against him in the regimental defaulter book for a certain specified time. 132

170. PROCEDURE AS TO DESERTERS.—On reasonable suspicion a constable, or in his absence any officer, soldier, or other person, may apprehend a person whom he suspects to be a deserter from the army, or a deserter or absentee without leave from the army reserve or militia reserve, or the militia, and forthwith bring him before a court of summary jurisdiction. S. 154 R.F.A. 16 M.A. 24

The Queen's Regulations give full details as to the method of dealing with deserters and offences against enlistment. The following main principles should be noted :— Q. vi 126–153

A descriptive report of any man who is suspected of desertion is at once sent to the police.

A soldier on leave who is not heard of five days after the expiration of his furlough is reported a deserter, as well as a man absent more than twenty-one days. In other cases the soldier is reported as an absentee, unless there is reason to believe that he is a deserter. Q. xiii 51 Q. vi 126

A person who is apprehended as a deserter *while not serving*, is taken into civil custody and kept until sufficient evidence is forthcoming to deal with the case, and a report is made to the prescribed authority. When the justice or magistrate is satisfied that the man is a deserter, he duly commits him as such, and hands him over as soon as practicable to the military authorities. If a deserter is discovered *while serving*, the offence is at once reported, and the offender is kept in military custody till orders are received as to whether he is to be tried or his trial is to be dispensed with. Q. vi 128 165 Q. vi 133

171. FRAUDULENT ENLISTMENT.—A soldier in the regular army, a militia man when *embodied*, or a reserve S. 13 M.A. 26

man when called out (and therefore part of the regular forces), who enlists without fulfilling the proper conditions into any of the regular or reserve forces, or the militia, or the Royal Navy, is guilty of *fraudulent enlistment*.

An *embodied* militia man who enlists in any of the other auxiliary forces, and a volunteer or yeoman *on actual military service*, or a man of the Royal Navy who enlists in the militia without fulfilling the proper conditions, is guilty of fraudulent enlistment. All instances of fraudulent enlistment into the reserve or auxiliary forces committed by men of those forces and men of the Royal Navy, can be tried by a civil instead of a military court. 61

When the offender belongs to H.M. naval forces the case should be referred through the War Office to the Admiralty before taking steps to bring him before a civil court. A.C. 306–80

Attempt at.—Soldiers of the regular forces who attempt to fraudulently enlist, or make a false answer on attestation, are charged with conduct to the prejudice of good order and military discipline. A man of the militia who attempts to fraudulently enlist in the auxiliary or reserve forces, or enter the Royal Navy, and a man of the reserve or auxiliary forces or of the Royal Navy who attempts to fraudulently enlist in the militia, and all men who attempt to give a false answer on attestation under similar circumstances, can be awarded by court-martial a punishment not exceeding imprisonment. If tried for the same offence by a civil court, the amount of punishment for the attempt must not exceed half that which could be awarded for the original offence. M.A. 26

Discharge with ignominy.—The most serious offence in connection with enlistment occurs when a man who has been discharged *with disgrace* from *any part* of Her Majesty's forces enlists, without declaring the fact, in the regular forces or the militia. S. 32 M.A. 10 152

172. FALSE ATTESTATION.—In all other cases of illegal enlistment a man of the regular, auxiliary or reserve forces, or a civilian, is liable to be tried for making a false statement on attestation either by a military or civil court, according to circumstances. S. 35 M.A. 26 S. 99 **61**

The ordinary cases which might arise are—a recruit makes a false answer when being attested; a militia man (not embodied) enlists in the regular, reserve, or auxiliary forces or enters the Royal Navy; a reserve man (not called out) or a yeoman or volunteer (not on actual military service) enlists in the regular forces or the militia; a man of the Royal Navy enlists in the regular forces. **206**

Attempt at.—See Fraudulent Enlistment.

Of militia man.—A militia man found to be serving in the regular army or militia without having obtained a release from his existing militia engagement may be, with the consent of the officer commanding the militia regiment, retained in the service without other punishment than payment of 1*l.*, or, if he belong to the militia reserve, 2*l.* Q. vi 141 P.W. 757 A.C. 195–82

173. REPEATED OFFENCES.—Fraudulent enlistment with regard to trial and punishment is similarly treated to desertion (not on active service), and can be awarded a higher punishment for a second offence.

Desertion may be reckoned as a previous case of fraudulent enlistment, but it must be remembered that a man must have served between the date of his desertion and that of his fraudulent enlistment. Suppose, for instance, that a man deserts from a regiment and is apprehended, tried, and convicted, and sent back to his regiment at the expiration of his sentence. He again absents himself and enlists in another regiment. On being found out he would be charged with fraudulent enlistment, and the former conviction of desertion would be reckoned against him. S. 13

A man who has fraudulently enlisted in a regiment,

and is then discovered to have deserted a year previously from another regiment, is only liable under ordinary circumstances to be tried for a single offence either of desertion or fraudulent enlistment, and would in ordinary cases be charged with the latter crime.

Exceptional instances might arise in which the previous desertion was completely proved with regard to *intent*, as, for example, if the man deserted to evade foreign service. There is then no absolute bar to his being tried both for that desertion and the subsequent fraudulent enlistment, but the desertion would not count as a previous instance for the purpose of awarding the higher penalty of penal servitude.

As a rule a soldier will be tried in his present corps, and will be held to serve on the terms of his last attestation, but if he has fraudulently enlisted in the militia or reserve forces he will be sent back to his former corps. Q. v 139

Men of the reserve and auxiliary forces become liable to the higher penalty of penal servitude for a second offence of fraudulent enlistment, and for a second offence of either fraudulent enlistment or false attestation can receive from a civil court the increased penalty of six months' imprisonment. M.A. 43, 26

174. LIMITATION CLAUSE.—A man can always be tried for fraudulent enlistment except when three years have elapsed between the commission of the offence and the charge being made, and the offender has served during those three years in an exemplary manner. S. 161 58 Q. vi 37

The only effect on the offender will then be that, as he has chosen to enter into a new contract to serve, he will be held to the terms of that contract or last attestation, and all service prior to such last attestation will be ignored.

The obtaining of a free kit should not form a part of the particulars of a charge for fraudulent enlistment when trial takes place after the three years' limit. Ap. I. 23

175. REMARKS.—The confession of fraudulent enlistment, false confession of same, penalties on conviction, and restoration of service are treated identically as in the case of desertion. S. 73 S. 27 165

176. ABSENCE WITHOUT LEAVE.—A man can be punished for absence when he goes away and stays away from the place, regiment, or barrack where he ought to be, without leave being in proper form granted to him. S. 15

It should be clear that the offender did not *intend* to quit the service or to absent himself in order to evade some particular duty. In these cases he would usually be tried on a more serious charge, if not for desertion.

When an absence is involuntary the main question to decide is whether it was caused by a legal or illegal act. If by the former a man should not be punished, if by the latter he *may* be.

'A sergeant went from Chatham to Gravesend in the afternoon without a pass. As he was about to return by train he was arrested, and prevented from catching his train, and was thereby late. He was tried and convicted of absence without leave, and the conviction was upheld on the ground that the absence, though involuntary, was caused by the illegal act of going to Gravesend without a pass.' O'D. 60

On furlough.—A soldier on furlough who is prevented from returning by sickness or any other cause can get his furlough extended for a month by a Justice of the Peace, and is not liable to punishment on account of such further absence. S. 173

If a soldier does not return at the expiration of his furlough, he is punished for either absence or desertion according to circumstances. Five days after the end of his leave he is reported to the police as a deserter if he has not returned or sent a valid excuse.

Election time.—A soldier who has a vote has a right to record it at election time, and can without leave or Cl. 195

order absent himself for that purpose, and cannot be punished for such absence.

177. OVER TWENTY-ONE DAYS.—Absence over twenty-one days cannot be dealt with by a commanding officer or regimental court-martial without permission. When a soldier or a man of the militia or reserve forces who is subject to military law is absent without leave for twenty-one days a court of inquiry is ordered to assemble, which takes evidence on oath sufficient to prove the illegal absence of the soldier and any deficiencies of kit that were noticed at the time of his first absenting himself. Q. vi 85 S. 72 R. 124 M.A. 28 R.F.A. 19 274

The declaration of the court with regard to the above facts is recorded in the regimental books, and the record thus made is admissible as evidence against the prisoner when tried, or, if he is not apprehended, has the legal effect of a conviction for desertion.

When a man of the militia or reserve forces fails to appear when called out for training or embodiment, an entry as to the fact is to be made in the regimental books after 14 days, and such entry shall be conclusive evidence of his absence.

Not desertion.—It is a common error to suppose that absence without leave over twenty-one days constitutes desertion. If, however, a man is absent twenty-one days he is reported to the police as a deserter, and if he has no valid excuse for being so long absent, he can be brought up on a charge of desertion, and it will rest for him to prove that he did not go away with the intention of quitting the service. Q. vi 126

The crimes of absence without leave and desertion are intimately connected, and the officer who sends the case for trial has to decide whether there is sufficient reason to believe that the absence of a prisoner arose from an *intention* to desert. The court, if they have any doubt on the matter, can always find a prisoner guilty of the lesser offence. S. 56

178 UNDER TWENTY-ONE DAYS. — Absence without leave up to twenty-one days can be dealt with by a commanding officer either summarily or by regimental court-martial. For absence not exceeding five days a man can be deprived of his pay, and if the absence exceeds five days his pay is necessarily forfeited. In cases of absence exceeding seven days the prisoner can demand that the evidence be taken on oath. 40 43 P.W 766 36

179. ABSENCE, MILITIA AND RESERVE. — Reserve and militia men when not subject to military law are, in certain cases, subject to trial for absence either by a military or civil court; as, for example, when a militia man fails to appear when called out for embodiment or training, or when a reserve man does not appear when called out on permanent service or for training, or in aid of the civil power, or fails to attend at any place to which he is ordered in accordance with the regulations of the Reserve Act. M.A. 23 R.F.A. 6, 15 152

Assisting a man to absent himself.—Any person who in any way assists a man of the reserve forces or the militia to absent himself without leave is liable, on conviction by a civil court, to a fine not exceeding 20*l.* M.A. 25 R.F.A. 17

180. TRIAL BY CIVIL COURT.—In all cases of desertion, absence, fraudulent enlistment, and making false statements on attestation, and for certain offences connected with the payment of the reserve forces, men of the auxiliary and reserve forces are liable to be tried by a civil court instead of a court-martial, and are punished according to the nature and degree of the offence by fine or imprisonment. M.A. 23, 26 R.F.A. 6, 15 61 152

CHAPTER XXI.

CRIMES—(*continued*).

181. SCANDALOUS CONDUCT. 182. EMBEZZLEMENT—Fraudulently misapplying — Stealing. 183. DISGRACEFUL CONDUCT—Theft—From Soldier—From Civilian. 184. DRUNKENNESS—On Duty — Not on Duty. 185. OF OFFICER — Of Non-commissioned Officer. 186. OF SOLDIER — Aggravated case. 187. JURISDICTION OF COURT — Single Offences — Evidence taken. 188. NO EXCUSE. 189. MAKING AWAY WITH KIT. 190. CONTEMPT OF COURT—Of Soldier—Of Civilian—Of Prisoner —Of Counsel. 191. CONDUCT TO THE PREJUDICE OF GOOD ORDER. 192. CIVIL OFFENCES.

181. SCANDALOUS CONDUCT OF AN OFFICER.—An officer who is convicted of behaving in a scandalous manner unbecoming the character of an officer and a gentleman *must be* cashiered. S. 16 197

The essence of the offence lies in the word *scandalous*. Sm. 839 If an officer behaves in a scandalous manner he necessarily behaves in a manner unbecoming an officer and a gentleman. The fact by itself of behaving in a manner unbecoming an officer and a gentleman is not a military offence. There appears no authority by which an officer charged under this section could be found guilty of a lesser offence, such as conduct to the prejudice of good order and military discipline, though formerly such was the custom. 119

Scandalous conduct may partake either of a military or social character, but in the latter case an officer should Sm. 159

not be charged with it unless the offence be of a character which reflects so much discredit on the officer or his corps that his removal from it is a necessity.

182. EMBEZZLEMENT.—Embezzlement is the fraudulently converting to one's own use property received, taken possession of, or held for another. It differs from ordinary theft in being a breach of trust as well as a fraud, and can only be committed by persons acting in the capacity of clerk or servant to the party defrauded. S. 17 Sm. 1197

Fraudulently misapplying is an offence very similar to embezzlement, and is the misappropriating of money or property entrusted to a person for custody or for some particular purpose, and the diverting of it improperly from that purpose.

A pay-sergeant would be tried for fraudulently misapplying the money entrusted to him for paying his company, or a canteen-sergeant for improperly making away with canteen money. If, however, there was a question of another sum, such as a cheque given him to cash, he might be charged with embezzling it.

Stealing, for the purposes of this section, does not refer to ordinary cases of theft, but rather to those cases where a man has legally access to and temporary control over property, and fraudulently makes away with it.

It will be noticed that this section deals entirely with persons in a position of trust, such as a pay-master or pay-sergeant, and does not affect the private soldier.

With regard to pay-sergeants and other non-commissioned officers, it should be remembered that they can only be rendered liable to an amount for which they, strictly speaking, ought to be put in charge of. 208

A man charged with embezzlement may be found guilty of stealing or fraudulently misapplying, and a man charged with stealing may be found guilty of embezzlement or fraudulently misapplying. S. 56

183. DISGRACEFUL CONDUCT OF A SOLDIER.—All offences included in S. 18 come under the general heading of disgraceful conduct, and can be punished on active service in the case of a private soldier by summary punishment. A charge cannot, however, be headed by the terms 'disgraceful conduct' unless it be of a cruel, indecent, or unnatural kind. S. 18 S. 44 S. 18 (5)

Theft.—Theft or larceny may be defined as the wrongfully taking and carrying away the property of another, without the consent of the owner, and with the felonious intent to convert it to one's own use. Hence to constitute a theft it must be proved—

(1) That the property belonged to another.

(2) That it was feloniously taken.

(3) That it was feloniously carried away.

From soldier.—Owing to the manner in which soldiers live, and the opportunities they have of taking one another's property, theft from a comrade is looked upon as a very serious military offence. Hence the theft by a soldier from a comrade is generally dealt with by a court-martial, and would be visited by more severe punishment than would be inflicted by a civil court.

Before charging a soldier with theft of a comrade's property, particular care must be taken that it is certain the articles in question are really stolen, and not borrowed or mislaid, or otherwise legally obtained.

From civilian.—It should be noticed that in order to charge for theft under this section, the property stolen must belong to a public or regimental service or to some officer or soldier. Theft from a civilian must be charged under S. 41, or disposed of by a civil court. In garrison towns civilians often apply to have the case disposed of by a court-martial, as the value of the article stolen can be recovered either at once or by means of the stoppages to which the prisoner is usually sentenced. S. 75

184. DRUNKENNESS.—A person subject to military law can be tried on a charge of drunkenness or of drunkenness on duty. S. 19

Drunkenness on duty would only be charged when an offender was actually in the performance of some military duty, or was drunk on parade, or on the line of march at any period from the date of departure till the date of arrival at destination. Q. vi 54

A soldier may be continuously on duty when employed on some special service, such as aiding the civil power or rendering some public service, and would be considered on duty while the special service lasts, even although not always actively employed.

Simple drunkenness.—In all other cases a man would be tried for *drunkenness*, or, as it is usually termed, simple drunkenness, or drunkenness not on duty. There is no distinction made as to the punishment of this offence when committed on or off duty, and hence, if there is any doubt as to whether a man was actually 'on duty,' it is better to use the simpler charge, and let the court signify its opinion of the gravity of the offence by the amount of punishment it awards.

185. OF OFFICER.—An officer can now be charged with drunkenness whether on duty or not. The distinction of being drunk on duty *under arms* is now done away with, and it is not necessary to bring the offence under the head of scandalous conduct, or of conduct to the prejudice of good order and military discipline. S. 16 S. 40

Of non-commissioned officer.—A non-commissioned officer can be tried for a single offence of drunkenness, on or off duty. A commanding officer has, however, complete discretion as to sending the case for trial; but if he disposes of it summarily he can only reprimand or reduce from acting rank, and cannot award a fine. S. 183 Q. vi 44

186. OF SOLDIER.—When a soldier is charged with drunkenness, inquiries must be made as to whether the case is an aggravated one or not.

Aggravated case.—An aggravated case of drunkenness includes all instances of *drunkenness on duty* and, in addition, the cases when an offender is drunk when warned for duty, or when, by reason of his drunkenness, he is unfit for duty. S. 44

It is generally held, however, that if a soldier is *unexpectedly* called upon to perform some duty to which, in the ordinary course of events, he is not liable, and he is then found drunk, it is not an aggravated case.

It is evident that a man who has committed an aggravated case of drunkenness would be charged either for drunkenness or drunkenness on duty, according to the circumstances of the case. An aggravated case of drunkenness can always be sent for trial by court-martial, and renders the soldier liable to summary punishment on active service.

A sentry drunk on his post should be tried under S. 6. S. 6

187. JURISDICTION OF COURT.—A court-martial under S. 19 has absolute jurisdiction to try the offence of drunkenness under any circumstances, and can therefore try any single offence of drunkenness, whether simple or aggravated. The practice of dealing with offences of simple (*i.e.* not aggravated) drunkenness is, however, limited by S. 46, which states that a commanding officer is bound to deal summarily with a simple case of drunkenness, provided it is not more than the fourth case within twelve months. 42

Single offences.—The only cases in which a court-martial would deal with offences of simple drunkenness which should be punished with fine by a commanding officer are—

1. When a soldier is sent for trial through an error of his commanding officer and contrary to S. 46 (3).

2. When a prisoner is charged with drunkenness on duty, and the court find him guilty of simple drunkenness, and there does not appear to have been four previous instances in the preceding twelve months.

3. When a soldier appeals against the fine inflicted by his commanding officer.

In such cases the court should not award a punishment greater than that which a commanding officer could, under the circumstances, inflict.

Evidence taken.—That an offence of drunkenness is *aggravated* does not appear in the charge, and must therefore be elicited by the evidence in order that a proper punishment may be awarded. The court should also before passing sentence satisfy itself as to whether the commanding officer forwarded the offence for trial in error, and must note if it be a case of appeal against the award of a commanding officer. 121 126

188. NO EXCUSE.—Drunkenness is, by English law, held to be no excuse for crime. The wisdom of this is apparent, for, if it were considered a palliation, an offender before deliberately committing a crime would get drunk. Sm. 591 Q. vi 92

On the other hand, it is evident that cases will occur when a man may commit a crime in a drunken fit which he would be loth to do if he was sober. This is especially the case in offences of insubordination and using insubordinate language, and although, legally speaking, the drunkenness is no excuse, yet a military court would be justified in treating the offence more leniently than would otherwise be the case.

189. MAKING AWAY WITH KIT, &c.—In cases of deficiencies being found in kit or equipment, alternative charges are usually made when there is any doubt as to what has become of the articles in question. In ordinary S. 24 208

instances the evidence only goes to prove a loss by neglect, and a single charge is all that is necessary.

The Act distinctly specifies that the kit or equipment is the property of the prisoner, and therefore a man cannot be charged with losing by neglect property entrusted to him. A soldier servant could not be tried under this section for making away with his livery, or a mess waiter for losing property belonging to a mess, or a man for spending money temporarily entrusted to him.

A man can be tried for making away with a medal, but not for losing it. When a medal is deficient a board inquires into the matter, and, according to its report, the soldier is either tried or the medal is replaced either at once or eventually at the soldier's or the public cost, according to circumstances. Q. xx 14–19

190. CONTEMPT OF COURT.—It is the duty of the president to keep order in the court, to check the use of insulting and threatening language, and put a stop to any interruption or disturbance. 228 233 246

A person guilty of any contempt of court should be warned of the punishment which may be inflicted for that offence.

In ordinary cases, an interruption to the proceedings will be best dealt with by ordering the offender to be turned out of the court, or an apology may be accepted.

Of soldier.—When contempt of court is committed by a person *subject to military law* he can be taken into military custody, and can be tried by another court for contempt. S. 28

When the court is insulted or its proceedings disturbed, it may summarily award by order, under hand of the president, imprisonment for a period not exceeding twenty-one days.

Of civilian.—When contempt of court is committed by a person not subject to military law, the offence should be reported in writing to a civil court of law. S. 126

No more force than is actually necessary should be used in removing the offender from the court, and if he is guilty of any disturbance outside, a policeman should be sent for to remove him. Sm. 456

Of prisoner.—If it be necessary to punish a prisoner for contempt of court, it must be remembered that the trial cannot go on in his absence. R. 6

The court must adjourn till after the expiration of the imprisonment summarily inflicted, and then go on with the trial, or delay the carrying out of the punishment till the trial is concluded. In this latter case the sentence summarily inflicted will run concurrently with the sentence awarded by the court, and hence will in the majority of cases be inoperative. For instance, if a prisoner was sentenced to twenty-one days' hard labour under hand of the president, for contempt, and the court sentenced him subsequently to twenty-one days' hard labour, the effect of the president's action would not be felt.

It will be advisable generally, in the rare cases of this offence which are likely to arise, to complete the proceedings with the exception of the sentence and adjourn, reassembling to pass the sentence at the expiration of the punishment which has been summarily inflicted. O'D. 86

Of counsel.—Counsel are liable to be punished by a civil court for contempt of a military court to the same extent as if they committed the offence in one of the High Courts of Justice. S 129

The president may, by an order in writing, order a counsel to be removed from the court, but must certify the offence committed to a civil court competent to deal with cases of contempt of court.

191. CONDUCT TO THE PREJUDICE OF GOOD ORDER AND MILITARY DISCIPLINE.—The offence charged must not be one which can be met by any other specific section. Stress must be laid on the word *military*, and offences of a social character or con- S. 40

nected with civilians should not be charged under this section, unless they are of a nature tending to infringe military discipline. 192

It has been decided that a soldier cannot be charged under S. 40 for impertinence to a civilian, or refusing to refund money borrowed from a civilian or soldier. A non-commissioned officer, however, who took advantage of his military position in borrowing and not refunding money to a soldier might be tried. O D. 99

Attempts to commit military offences should, unless specially provided for, be charged under this section.

192. CIVIL OFFENCES.—By Section 41 offences punishable by the law of England, if committed by persons subject to military law, are, with certain limitations as to the place of trial in the case of the most serious offences, triable by court-martial, and can be punished to the same extent as such offences would be punished by a civil court. A military court must not, however, exceed the powers given to it by the Army Act. S. 41 59

There are many minor civil offences which would be ordinarily dealt with by a regimental court-martial, such as an assault on a civilian, or injury to private property. Many of these petty offences are undoubtedly 'to the prejudice of good order and military discipline,' and would be punished accordingly. If charged under Section 41, permission for trial should be obtained from a superior officer. 59

Offences against the ordinary criminal code of the country should be notified to the local police, in order that they may be investigated and punished by the civil criminal tribunals. A.C. 31/86

In cases of murder where the accused and deceased were both subject to the Army Act, the magistrates should transmit a copy of the depositions to the War Office, in order that the Secretary of State may decide whether it is expedient to take steps for a speedy trial under the Homicide Act of 1862.

CHAPTER XXII.

PUNISHMENTS.

193. PUNISHMENTS—Civil Offences—Gradation of. 194. SCALE OF PUNISHMENTS — Warrant Officers. 195. EXECUTION OF SENTENCE. 196. PUNISHMENT OF OFFICER. 197. CASHIERING AND DISMISSAL. 198. FORFEITURE OF RANK. 199. REPRIMAND. 200. DEATH—Recording Sentence. 201. PENAL SERVITUDE —Death and Penal Servitude. 202. IMPRISONMENT. 203. DISCHARGE. 204. REDUCTION. 205. FORFEITURES. 206. FORFEITURE ON CONVICTION. 207. FINES. 208. STOPPAGES—As to Kit—As to Property—As to Moneys. 209. PENAL STOPPAGES — Forfeiture — Stoppage. 210. SUMMARY PUNISHMENT. 211. COMBINING PUNISHMENTS. 212. COMMUTING PUNISHMENTS.

193. PUNISHMENTS.—Under the old law the expression used in reference to the punishment of an offence was 'such punishment as a general or other court-martial may award.' The Act now assigns a maximum punishment to each offence, which need only be given when the offence is of the worst type or when an example must be made.

Civil offences.—The civil offence of murder may be punished by death, of treason by death or less punishment, of manslaughter, treason-felony, or rape by penal servitude or less punishment, subject to the restrictions laid down in S. 41. 59 S. 41

All other civil offences may be punished by imprisonment or such less punishment as may be awarded by a civil court. In dealing with civil offences a military

court must not exceed its powers as laid down in the scale.

Gradation of.—The punishments are in order of severity placed in a scale, and when a certain punishment is not peremptorily ordered, any punishment lower in the scale can be awarded, due regard being had to its suitability to the offence. S. 44

194. SCALE OF PUNISHMENTS.—The following table shows both the scale of punishments and the maximum powers of the several courts :—

SCALE OF PUNISHMENTS.

Sec.	Officers	Court by which tried
44	*a.* Death. *b.* Penal servitude, not less than 5 years. *c.* Imprisonment, with or without hard labour, for 2 years. *d.* Cashiering. *e.* Dismissal from H.M.'s service. *f.* Forfeiture of seniority of rank. *g.* Reprimand, or severe reprimand.	General court-martial.

	Soldiers	Court by which tried		
	a. Death. *b.* Penal servitude, not less than 5 years.			
44	*c.* Imprisonment, with or without hard labour, for 2 years. *d.* Discharge with ignominy.			General court-martial.
47	Imprisonment for 42 days, with or without hard labour. *e.* Reduction of non-commissioned officer to lower grade or ranks. *f.* Forfeitures, fines, stoppages.	Regimental court-martial.	District court-martial.	
181	Dismissal of a volunteer.			
183[1]	Dismissal or reduction to lower grade of pay of schoolmaster.			

Warrant officers.—A warrant officer holding an honorary commission ranks as an officer and is punished as such.

[1] An army schoolmaster cannot be sentenced to death nor reduced to the ranks.

A warrant officer (not holding an honorary commission) cannot be tried by a regimental court-martial, and if tried by a district court can only be awarded the following punishments :—

Sec.	Person tried	Punishment	Court of trial
S. 18	Warrant officer.	1. Dismissal. 2. Suspension from rank, pay, and allowances. 3. Reduction to a lower class or grade. 4. Reduction to the ranks (only if raised from the ranks).[1] 5. Forfeitures, fines, stoppages.	District court-martial.

195. EXECUTION OF SENTENCE.—A court-martial has nothing to do with the details of carrying out a punishment.

It is the duty of the confirming officer to see that a sentence is carried into effect, and give the necessary directions himself or refer the matter to a superior. Abroad, a provost-marshal may be ordered to carry out **77** a punishment.

196. PUNISHMENT OF OFFICER.—The sentences of **145** death, penal servitude, cashiering, or dismissal passed on an officer must, if tried in India, be confirmed by the Commander-in-Chief in India, and if elsewhere by the Queen.

197. CASHIERING AND DISMISSAL.—The distinction **Sm. 116** between cashiering and dismissal of an officer has never been clearly defined. It is generally held that cashiering is a bar to an officer serving under the Crown again in any capacity, while dismissal does not carry with it any further penalty.

[1] A warrant officer can, however, be sentenced by general court-martial to any punishment authorised by the Act. If reduced to the ranks he is at once given his discharge. **Q. xix 258**

The only peremptory punishment mentioned in the Act is that of cashiering an officer for an offence of scandalous conduct. S. 16 181

198. FORFEITURE OF RANK.—An officer can be sentenced to forfeiture of seniority of rank, either in the army or in his regiment, by altering the date of his commission, but cannot be reduced from one rank to another. R. 46 Ap. II (10)

Officers may be sentenced to forfeit their medals and decorations, together with any attendant annuities. P.W. 912

Orders conferred on individuals at the express wish of the Sovereign, such as a C.B., are not military decorations within the meaning of the Act.

An officer of the Indian Staff Corps may be sentenced to forfeit all or a portion of his army or staff service. S. 180

199. REPRIMAND.—Reprimands vary from a public and severe reprimand to a private reprimand or admonition. A public reprimand may be issued in General Orders, or it may be administered on a public parade of troops. Private reprimands are usually given by the commanding officer of the prisoner at his quarters, in the presence of officers of the regiment, or of officers of equal and superior rank only, or simply in the presence of a staff officer. Sm. 670

The manner and time of delivering the reprimand is fixed by the confirming officer.

200. DEATH.—A soldier would be sentenced to be either hanged or shot according to whether it was a civil or military offence which had rendered him liable to the penalty of death.

A sentence of death can only be passed by a general court-martial, and then only with the concurrence of two-thirds of its members. S. 48 127

Recording sentence.—A civil court may order a sentence of death to be *recorded*, which has the effect of suspending the execution of the sentence till Her Majesty's pleasure with respect to the prisoner is known.

201. PENAL SERVITUDE.—When a prisoner has been sentenced to penal servitude, he is committed without delay by the proper authority to a penal servitude prison and comes under the power of the Home Secretary. S. 58 62 Q. vi 157

A prisoner sentenced abroad to penal servitude or imprisonment exceeding twelve months is sent to a prison in the United Kingdom, unless it appears to the Secretary of State that such a transfer is not beneficial to the prisoner by reason of birth, climate, or the place of his enlistment. S. 131

All sentences, whether of penal servitude or other punishments, commence from the day on which the president signs the original proceedings. **128**

Death and penal servitude.—The penalties of death and penal servitude can only be awarded for those military offences which are declared to be so punishable by the Army Act, and can in certain cases be awarded for civil offences. S. 69 **146** S. 41

202. IMPRISONMENT.—The imprisonment inflicted under one or more sentences must never exceed two years, and commences on the day on which the original proceedings are signed by the president. S. 63-68 S. 131

In calculating the date on which sentences expire, the rule will be apparent from the following examples, viz. :— Q. vi 203 **129**

(*a*) A sentence of eight months' imprisonment awarded on September 30 expires on the following May 29. If awarded on October 1 it expires on May 31.

(*b*) A sentence of nine months' imprisonment awarded on May 29, 30, 31, expires on the last day of the following February.

A prisoner is committed to either a civil or military prison by the proper authority, but if the sentence does not exceed forty-two days it may be carried out in a provost prison. Q. vi 162

A prisoner sentenced to more than twelve months' imprisonment in India or in a colony is sent to a prison in the United Kingdom, except in the case referred to in preceding paragraph. 201

Certain authorities are noted in the Act as having power to 'commit' to prison, to 'remove' from prison to prison, and to 'discharge' a prisoner.

A prisoner may be moved from one public prison at home to another, provided that he be not removed out of the United Kingdom from a prison therein.

When a regiment abroad moves from colony to colony it can take its prisoners with it, but they can only be recommitted to a military prison or the *authorised* prisons laid down by regulation, and not to ordinary public prisons. R. 129

In the case of a regiment going abroad, a competent authority may order a prisoner to be delivered up to military custody so that he can be taken with the regiment, but the offender cannot be recommitted to a prison abroad. S. 67

A prisoner convicted of offences under the Army Act, Secs. 17 and 18 (4) (5), or of any offences of a similar character under Sec. 41, will be committed to a public prison. Q. vi 162

A prisoner convicted of an offence constituting a breach of discipline only will be committed to a military prison.

When a soldier is released from imprisonment at any hour he is confined to barracks for the remainder of the day, but is exempt from any duty. Q. vi 190 44

201. DISCHARGE.—Soldiers sentenced to penal servitude and imprisonment may in addition be sentenced to discharge with ignominy; and although this punishment can S. 44

legally be awarded by itself, it practically is never given unless accompanied by either penal servitude or imprisonment.

Whether sentenced to discharge or not, all soldiers who have undergone penal servitude are to be discharged and not allowed to rejoin the service. Q. xix 250

The carrying out of a punishment of penal servitude or imprisonment inflicted on a soldier is not affected by his being sentenced to be discharged, or otherwise ceasing to be subject to military law, and he is punished as if he continued to be subject to that law. S. 158 58

A regimental court-martial has not power to deal with sentences of discharge with ignominy. S. 47

204. REDUCTION.—A non-commissioned officer can be reduced to any lower grade or to the ranks either in addition to or without any other punishment. S. 183

A non-commissioned officer should always be sentenced to be reduced to the ranks before a sentence of penal servitude or imprisonment is passed, as the sentence necessarily involves reduction.

Regimental courts-martial for the trial and reduction of non-commissioned officers can be held on board H.M.'s ships. Q. xvii 73 57

Care must be taken in wording a sentence of reduction when the prisoner holds acting rank or an appointment. A non-commissioned officer can only be reduced to or from a legal rank. Thus a lance-sergeant could not be reduced to a corporal, as the former is not a rank.

In a recent court-martial at Woolwich a farrier-sergeant was sentenced to be reduced to a shoeing-smith. The conviction was quashed, as a shoeing-smith is not a rank but an appointment. Q. vii 112

When a prisoner holds acting rank it is advisable that it should be mentioned in the charge, but no notice of it should be taken in awarding the sentence.

205. FORFEITURES.—A prisoner can be sentenced to forfeit— S. 44

1. All or any of his past service towards pension. P.W. 583
2. All or any deferred pay already earned. 650
3. All or any of his good-conduct badges. 912
4. Any medal, decoration, annuity, or gratuity. 929

But no forfeiture should be awarded when the offence is such that the conviction of it entails such forfeiture.

When a soldier confesses himself to have been guilty of desertion or fraudulent enlistment, a competent authority may dispense with his trial and order him to suffer such forfeitures as would necessarily result from his being convicted of the offence by court-martial.

The competent authority has, however, no power to alter or mitigate the forfeitures, which are the same as those incident on a conviction of desertion, but he can use his discretion in dealing with any deductions which a court-martial might have awarded.

206. FORFEITURE ON CONVICTION.—Certain forfeitures necessarily result from conviction. **169**

A soldier who is found guilty or who confesses guilt of desertion or fraudulent enlistment forfeits *all service* prior to the date of conviction. S. 79

A soldier who has fraudulently enlisted, but whose trial is barred by reason of three years having elapsed before he is charged, forfeits all service prior to such enlistment. S. 161

A soldier who is guilty of desertion or fraudulent enlistment, or who has been sentenced to penal servitude or to be discharged with ignominy, forfeits all service towards pension and all deferred pay, good conduct badges, medals, decorations, annuities, and gratuities. (When desertion or fraudulent enlistment is confessed and trial is dispensed with, a man does not forfeit medals, annuities, and gratuities issued before July 1881.) P.W. 577 580 649 652 910 931 932 P.W. 911

A soldier who has committed an offence of a felonious or disgraceful character, forfeits all medals, decorations, annuities, and gratuities. S. 17, 18 P.W. 910

A soldier who has been sentenced by a civil court to imprisonment exceeding six months forfeits all good conduct badges and all medals, annuities, and gratuities issued subsequently to July 1881. P.W. 911 930

A soldier belonging to the reserve forces who improperly enlists in the army forfeits all pension, deferred pay, and good conduct badges earned by service prior to such improper enlistment. P.W. 582 649 930

207. FINES.—In addition to other punishments, a soldier can be sentenced to a fine of 1*l.* for drunkenness. S. 19

Courts-martial are in certain cases called on to administer the ordinary criminal law of England, and can in such cases fine up to the limits of that law, and the fine should be ordered to be paid to Her Majesty. S. 41

208. STOPPAGES.—In sentencing a prisoner to deductions or stoppages care must be taken to arrive at the exact amount which ought to be deducted. When the amount cannot accurately be determined, the court must sentence the prisoner to a stoppage which will without doubt cover the loss or damage, and leave the adjustment of the exact amount to the officer who has to make the actual deduction from the soldier. S. 138 Q. vi 81

As to kit.—When a soldier is charged with making away with or losing a portion of his kit, the value of the articles are stated in the charge if they belong to Government and the value has to be made good to the public—such as great-coat, shako, &c. If, however, the articles are the property of the soldier, which he has to keep complete in number and in good order at his own expense, the value is not stated in the charge. **215**

When the value of articles is not stated in the charge, Q. vi 82

all reference to such articles should be omitted in the sentence.

The court is right in punishing for the offence of losing the articles in question, but it is not necessary for it to enter into the question of replacing them, as that is the duty of the prisoner's commanding officer. 46

As to property.—When several men are convicted of collectively destroying Government property they may each be sentenced to pay the full amount of damage. In carrying out the sentence the total loss is equally divided among those from whom the money can be recovered. O'D. 151

As to moneys.—When a prisoner is accused of making away with public or other moneys in his charge, the stoppage inflicted should be limited to such a sum as might reasonably have been left in his keeping. Pay-sergeants or non-commissioned officers in charge of regimental or other funds are not to be entrusted with more money than is absolutely necessary to carry on their duties. To take charge of public money is the duty of the officer commanding, and he is responsible that due supervision and proper checks are used. Q. vii 118

It should be remembered that a stoppage should not be ordered as a punishment to the prisoner, but as a means by which a certain loss to the public or an individual is made good.

209. PENAL STOPPAGES.—The penal deductions which may be made from the pay of an officer or soldier are laid down by the Act. S. 137 S. 138

It will be noticed that they only refer to the *ordinary daily pay*, and that the deductions are of two classes—one in the nature of a forfeiture, the other of a stoppage.

Forfeiture.—A man is deprived of the whole of his pay for every day in which he is absent from his work by reason of his own misconduct.

It is provided, however, that in cases of absence

without leave up to five days a commanding officer can use his discretion in enforcing a forfeiture of pay.

Stoppage.—The amount of pay stopped must, after allowing for the expenses of messing and washing, leave the soldier not less than 1*d.* to spend.

Stoppages fall under the following general heads :—

1. *Compensation*, to make good loss, damage, &c., which may be ordered by a court-martial, commanding officer, or captain of one of H.M.'s ships.

2. *Fine*, which may be awarded by a court-martial, commanding officer, or civil court.

3. *Stoppage*, by order of Secretary of State, to support wife or child. S. 145

4. *Stoppage* in lieu of liquor ration.

5. *Stoppage* in case of militia man who improperly enlists. P.W. 757

210. SUMMARY PUNISHMENT.—Summary punishment for a period not exceeding three months can be awarded by a court-martial under the following circumstances :— S. 44 **212**

1. *On active service*, when imprisonment *cannot* be inflicted.

2. *For the offences* of disgraceful conduct, aggravated drunkenness, or any offence punishable by death or penal servitude.

3. *The offender* must be a private soldier, and have committed the offence while a private soldier.

Summary punishment is of two kinds—field imprisonment No. 1, and field imprisonment No. 2.

An offender sentenced to field imprisonment No. 1 may be fettered by means of irons, straps, or ropes, and while so secured may be attached in a fixed position to a fixed object, but he must not be so attached for more than two hours in a day, or for more than three days out of four, or for more than twenty-one days in all.

Field imprisonment No. 2 refers simply to the fettering of a man by means of irons, straps, or ropes.

In both cases an offender may be subjected to any hard labour, employment, or restraint to the same extent as if he had been sentenced to imprisonment with hard labour.

Summary punishment must not be inflicted so as to cause injury or leave a permanent mark on the offender.

211. COMBINING PUNISHMENTS.—As a rule one of the punishments in the scale is awarded, but in the following cases punishments may be combined :— S. 44

An officer sentenced to forfeiture of seniority of rank may in addition be reprimanded.

A soldier sentenced to penal servitude or imprisonment may in addition be discharged with ignominy. 203

In addition to other punishments an offender may be sentenced to any authorised deduction from pay, or to forfeit the whole or any portion of his deferred pay, good-conduct pay, or service towards pension, together with any annuities, gratuities, or decorations.

212. COMMUTATION OF PUNISHMENTS.—Any sentence can be commuted to any punishment lower down in the scale to which an offender might have been sentenced by the same court. S. 44 S. 57

For example, death may be commuted to penal servitude or imprisonment, penal servitude to imprisonment, cashiering to dismissal, &c. 138 148

A soldier guilty of desertion or fraudulent enlistment (and not exempted by S. 161), and a soldier sentenced by a court-martial to imprisonment for not less than six months, may have his punishment commuted wholly or partially to general service by a competent military authority. S. 161 S. 83 S. 101

For the purpose of commutation *summary punishment* ranks next below penal servitude in the scale. S. 44

CHAPTER XXIII.

CHARGES.

213. CHARGE SHEET—Description of Prisoner. 214. CHARGE—Statement—Particulars. 215. FRAMING CHARGES—Distinct Offences—Time of Offence—Place of Offence—Loss or Damage—Words used—Unnecessary Particulars. 216. DEFECTIVE CHARGES. 217. ALTERNATIVE CHARGES. 218. JOINT CHARGES. 219. SEVERAL CHARGES. 220. PERSON MAKING CHARGE. 221. ALTERING CHARGES. 222. SEPARATE CHARGE SHEETS—Necessity for. 223. REMARKS.

213. CHARGE SHEET.—When a prisoner is to be tried by court-martial a *charge sheet* is laid before it containing a full description of his position, his name, rank, number (if any) and corps (if any), as well as the charge or charges brought against him. R. 9 R. 10 **222**

Description of prisoner.—In describing a prisoner it is immaterial whether he is charged by his real name or an alias so long as his identity is established. A prisoner would usually be charged under the name in which he was attested and was commonly known in his regiment. Sm. 390

A mistake as to the description of the prisoner does not invalidate the proceedings so long as no injustice is done to him. R. 12

If not belonging to the regular forces it is necessary to state in the description that the prisoner was, at the time the offence was committed, subject to military law, and either in the description or in the charge itself should be inserted sufficient data to enable the court to judge that such is the case.

Non-commissioned officers should be arraigned in their army rank, and if they hold acting rank it should be mentioned in a bracket. Thus, the prisoner No. 42, Corporal (Lance-Sergeant) A, &c. 129

214. CHARGE.—A charge means an accusation that a person amenable to military law has been guilty of an offence. R. 9

A charge should be divided into two parts :— R. 11

1. *The statement of the offence*, which should be in the words of the Army Act. (The headings in italics and the marginal references form no part of the Act.) R. 133 G. O. 26/80

The manner in which the statement of offence should be worded is laid down in Appendix I. of Army Act, which should be closely adhered to.

2. The *particulars*, which should be sufficiently explicit as to names, dates, and circumstances as to leave no doubt in the prisoner's mind as to what offence he is charged with. In the particulars should be stated all the ingredients necessary to constitute the offence. R. 11

215 FRAMING CHARGES.—The procedure as to charging a prisoner differs materially in civil and military courts.

A civil court can only try a man for offences arising out of a single transaction, while a military court can deal at the same time with several charges referring to totally distinct offences. Sm 401

Courts-martial are not bound by the technicalities of civil courts, but all vagueness in charges should be avoided, and they should be made as simple and direct as possible.

Distinct offences.—Each charge should state *one* distinct offence in clear and simple language, alike comprehensible by the court and the prisoner without legal assistance to explain terms and technicalities. R. 11 Sm. 395

A single transaction should not as a rule be made the subject of more than one charge, unless there is a doubt as to the precise nature of the offence when alternative

charges are used. Thus, a man should not be tried for absence without leave and failing to appear at parade during the time of absence, as the offences alleged are necessarily part of one transaction.

In no case should an offence be described in the alternative in the same charge.

A conviction in 1867 of a storekeeper for 'fraudulently embezzling *or* misapplying property' was set aside on this ground. Sm. 396

When a soldier is charged with a serious offence, minor irregularities should not be brought forward as additional charges. Thus a man should not be tried for desertion, and also for being improperly dressed when apprehended, as the lesser offence has merged in the graver one. Sm. 397

Time of offence.—The time at which an offence was committed must be stated with as great accuracy as the evidence in proof admits of. When the time is an essential factor in the charge, as in the case of a 'sentry sleeping on his post,' it is best to state between the hours of —— and ——, *i.e.* the time during which the prisoner was posted as sentry. When the exact date or time is unknown it is sufficient to use the terms 'on or about' the —— day of ——. Ap. 1

Place of offence.—It is usually sufficient in a charge to give a general description of the place where the offence was committed, such as 'at Aldershot,' or 'on the line of march.' If, however, the exact spot is material to the charge, as, for instance, in the case of a non-commissioned officer leaving his guard, the exact post or guard-room he was in charge of should be named. Ap. 1

Loss or damage.—When the prisoner is charged with any loss or damage, the value is stated in the particulars of the charge. When a loss of money is the subject of trial the lump sum only need be stated, and there is no necessity for distinguishing between gold, notes, &c.

In the case of articles of kit, the value is only stated in reference to articles of Government property—the value of which has to be made good to the public, such as a 189 203

great-coat, helmet, &c. The value of regimental neces- Q.vi. 80
saries which are the property of a soldier, such as cap, shirt, boots, &c., need not be stated, as deficiencies have to be made good by the soldier as a matter of necessity, and his captain debits his account for the same.

Words used.—When an offence consists of words 'used or written,' they should be inserted as accurately as possible. After the actual words it is usual to state 'or words to that effect.'

Unnecessary particulars.—It is undesirable to append O'D. 22
to a charge particulars not necessarily bearing on it. Thus, in a case of absence it is unnecessary to state that the man remained absent until he was apprehended, although such a fact may very properly be proved in evidence, and affect the sentence of the court.

216. DEFECTIVE CHARGES.—Where the statement of particulars specifies one offence while the heading of the charge refers to another, a conviction cannot hold good, as a man is being virtually tried for two alternative offences.

Similarly, where the heading of a charge discloses an O'D. 20
offence, and the particulars do not, the evidence must go to prove not only the particulars, but also the charge alleged, or a conviction will not hold good.

A charge may be defective either in heading or in statement of particulars, but it would generally hold good if in the charge as a *whole* the offence was shown to be one under the Army Act, and it was described with sufficient minuteness to enable the prisoner to know exactly what he had to answer.

217 ALTERNATIVE CHARGES. — When an offence has Sm. 395
been committed the charge should be clear and simple, **119**
and not expanded or split up, as is the custom in civil

courts. When there is any doubt as to how the offence should be described, or what military offence has been committed, separate alternative charges can be used. A prisoner can only be convicted on one of these charges, R. 36 and is necessarily acquitted of the other.

If a man was found improperly in possession of the property of others, and it was difficult to prove exactly how it came into his keeping, alternative charges might be preferred (1) of stealing the goods, (2) of receiving S. 18 them knowing them to have been stolen.

A man, again, might be charged with using insub- S. 8 ordinate language to his superior officer, and there might be a doubt as to whether the language was sufficiently strong to justify the term 'insubordinate.' An alternative charge of 'conduct to the prejudice of good order and S. 40 military discipline,' in using the words in question, might be necessary.

It was formerly the custom to prefer alternative S. 21 charges against a man whose kit was found to be deficient. Q.vi 79 A charge of 'losing by neglect' is, however, sufficient, unless some positive act of 'making away with, pawning, selling, &c.,' can be sustained.

218. JOINT CHARGES.—Any number of prisoners may be R. 15 tried *together* on one or more charges for offences which **101** have been committed by them collectively. Notice of the **131** intention to try them together must be served on each prisoner, and any of the persons arraigned can claim a separate trial if the nature of the charge admits of it on the ground that the evidence of the other prisoners is material to his defence.

The committing of an offence *collectively* implies a Sm. 402 certain amount of combination or mutual help, and does not refer to the commission of individual offences by men in the company of each other. Thus a number of men who were drunk together or were absent at the same time would be tried separately; while men might be

charged jointly with breaking the windows of a house, or assaulting an escort who had charge of them.

When prisoners are tried jointly it is desirable that the plea, finding, and sentence of each prisoner should be separately recorded.

The evidence tendered by all the prisoners is received before the prosecutor makes his address, or produces his witnesses in reply. R. 60 101

When a conspiracy among several prisoners is the essence of the charge, as in the case of mutiny or treason-felony, it is generally essential that the prisoners should be jointly arraigned. 93

219. SEVERAL CHARGES.—In the case of several charges the particulars in one charge may refer to the particulars in another. Thus a first charge may specify a distinct time and place, and a second charge merely state 'at the time and place specified in the first charge,' instead of again repeating the date and place. R. 11

If, however, the prisoner is acquitted of the charge in which the particulars are stated, and convicted of the other one, any subsequent record of conviction in regimental or other books must set out in full the particulars omitted. Ap. I

220. PERSON MAKING THE CHARGE.—The charges against a prisoner are, in the first instance, made by the commanding officer who investigates the case. Great care must be taken that the charge is adapted to the offence and the attendant circumstances, that no important point is left out, and that nothing is alleged that cannot be supported by evidence. Q. vi. 35-37

When a commanding officer does not himself assemble a regimental court-martial he forwards a copy of the charges to the convening officer, together with his application for a higher court. 78

The convening officer is further responsible that the charge is properly made and discloses an offence under the Army Act, and that the evidence (as shown in the summary of evidence) is sufficient to justify the trial of the prisoner. Q.vi. 84 R. 17

When a judge-advocate takes part in a trial he should be consulted as to the legality of the charge.

221. ALTERING CHARGES.—Charges can only be materially altered by the *convening* officer, and corrections must be made before any of the witnesses have given their evidence. R. 33 80

The president of a court-martial has an opportunity of seeing the charge sheet before the court assembles, and should inform the convening officer before the trial commences of any amendment he may think necessary. R. 17 66

The prosecutor must also of necessity see the charge sheet before the trial begins, and should report to the convening officer if there be any particulars alleged which, in his opinion, cannot be supported by evidence. 68

At any time during the trial a mistake in the name or description of the prisoner may be amended by the court, provided, of course, that the prisoner is not thereby prejudiced in his defence by such mistake or alteration. R. 33

The court must, however, satisfy themselves as to the legality and validity of a charge, and if in doubt should adjourn and refer the matter to the convening officer. R. 23 83

After a trial is commenced, if the court are of opinion that the essence of the charge is proved but that the particulars as alleged are defective, they may (if injustice is not thereby done to the prisoner) record a *special finding* amending the particulars in question. R. 43 119

222. SEPARATE CHARGE SHEETS. — The convening officer may direct, or the prisoner, if he has reasonable grounds, may demand, that the charges against him be R. 61

inserted in separate charge sheets. In such a case the 213
court shall, after having been sworn, arraign and try the prisoner in respect of each charge sheet separately *up to the finding*. The procedure after the finding shall be the same as if all the offences were contained in one charge sheet.

When a prisoner is tried on several charge sheets, the convening officer may direct that if he be convicted of one or more of the most serious offences in any charge sheet, he need not be tried on the other charge sheets.

Necessity for.—A military court is as a rule ill adapted to deal with cases in which the evidence is complicated. When offences of the same kind have been committed at different times, or when various distinct crimes unconnected with each other are charged at the same time, it is difficult to keep the evidence on each charge distinct. The regulations with regard to separate charge sheets have been introduced in order to aid both the court and the prisoner in taking evidence. By dealing with each charge separately the evidence can with ease be confined to it, and confusion does not arise by mixing up the evidence necessary to prove the other cases.

When various offences form part of one wrongful transaction, and the evidence is not likely to be complicated, one charge sheet is used. If, however, the offences are distinct, either in respect of time or the manner in which they arose, or if the witnesses are numerous or the evidence intricate, separate charge sheets are advisable.

For instance, a case of drunkenness and insubordinate language at the same time would be preferred in one charge sheet, while a man charged with more than one case of desertion or fraudulent enlistment might conveniently have each offence dealt with in a separate sheet.

223. REMARKS. — CHARGES: investigation of, by commanding officer, 33; against an officer, 34; against a warrant or non-commissioned officer, 35; against a sol-

CHAPTER XXIV.

WITNESSES.

224. SUMMONING OF WITNESSES. 225. ISSUE OF SUMMONS —To Soldier—To Prisoner. 226. SERVING OF SUMMONS. 227. EXEMPTION FROM SUMMONS. 228. DISOBEYING A SUMMONS. 229. PRIVILEGE OF WITNESS FROM ARREST —Non-attendance of Witness. 230. EXPENSES OF WITNESS. 231. COMPETENCY OF WITNESSES—Exceptions. 232. APPEARANCE OF WITNESSES. 233. OATH OF WITNESS—Refusal to be Sworn. 234. PROSECUTOR AS WITNESS. 235. MEMBER AS WITNESS. 236. PROSECUTOR'S WITNESSES. 237. PRISONER'S WITNESSES. 238. QUESTIONING WITNESS—Reply—Correcting Evidence. 239. RECALLING WITNESSES. 240. EXAMINATION OF WITNESS — Cross-examination — Re-examination. 241. EXAMINATION IN CHIEF—Leading Questions—When Admissible—Refreshing Memory. 242. CROSS-EXAMINATION —Leading Questions—Irrelevant Questions—Degrading Questions—As to Previous Statements. 243. PRIVILEGE AS TO ANSWERS—Criminating Answers—Degrading Answers—Professional Secrets—Official Secrets — Husband and Wife. 244. CONTRADICTION OF ANSWERS. 245. IMPEACHING CREDIBILITY OF WITNESSES. 246. CONTEMPT OF COURT. 246A. REMARKS.

224. SUMMONING OF WITNESSES.—Before the assembling of a court the convening officer, and after its assembly the president, are responsible that all witnesses whose attendance can *reasonably* be secured are either summoned or ordered to attend. If the judgment of the summoning officer in refusing to call a witness is S 125 R. 77

questioned, the court must decide as to whether the presence of the witness referred to is essential or not, and if it differs in opinion from the summoning officer it should adjourn and report the circumstance to the convening officer. R. 78

225. ISSUE OF SUMMONS.—A civilian witness is summoned to attend by the convening officer, or the judge-advocate, or the president of the court, or the commanding officer of the prisoner, according to circumstances. (For form, see Army Act, Ap. 2.) S. 125 R. 77 66 73

When documents of any kind which are necessary to the trial are in a witness's possession, a special clause must be inserted in the summons calling on him to produce them. Sm. 899

A witness, subject to military law, is ordered to attend by the proper military authority. R. 77

When a soldier belongs to a regiment in the same place in which the court-martial is held, application is usually made to his commanding officer. If the witness is at another station or in another district, the proper authority to refer to is the general of the district in which the witness is serving. When there is any doubt as to who is the proper military authority, application should be made to the adjutant-general. Q. vi. 88

When a military prisoner is required as a witness, the general officer commanding the district in which the prison is situated gives the order for removal. When a prisoner is confined in a civil prison, authority must be obtained from head-quarters before the order for removal is issued. If the witness required is a civilian, the necessary writ for his removal is obtained by the authorities at head-quarters. S. 63, 64 Q. vi. 175 Q. xvi. 20 Sm. 903

A person present in court may be called on to give evidence as a witness without any previous notice or formality.

226. SERVING OF SUMMONS.—A summons must be served personally and in reasonable time before the trial by some one in authority, such as a non-commissioned officer or a policeman. If the witness required be a married woman, it is not sufficient to give the summons to her husband. Summonses should be prepared in duplicate and one retained by the server, who should note on it the place and date of serving the other. Sm. 896 897

227. EXEMPTION FROM SUMMONS.—No person can claim to be exempt from a summons except the Queen. Officials in high positions would, however, be justified in refusing to be examined on matters which it would be contrary to the public policy to disclose. The summoning *without reasonable* cause of persons in high official position could be dealt with under S. 40. Sm. 893–895 S. 40

228. DISOBEYING A SUMMONS.—A witness subject to military law who does not obey a summons or order to attend, can be tried either for contempt of court or disobedience of orders, according to circumstances. S. 9 S. 28 190

A civilian witness who has been *tendered his reasonable expenses* can be tried by any civil court for contempt of court. 230

The president of the court-martial must certify in writing as to the offence committed. S. 126

229. PRIVILEGE OF WITNESS FROM ARREST.—A witness, whether civil or military, who has been summoned to attend as a witness before a court-martial is during his necessary attendance on such court, and while going to or returning from it, privileged from arrest to the same extent as if it were one of the superior civil courts—*i.e.* from arrest on civil process for debt, but not from arrest on a criminal charge. S. 125 S. 190 (29)

Non-attendance of a witness.—If a witness whose evidence is essential either to the prosecution or defence is from any cause absent, the court should adjourn, and report the circumstances to the convening officer. R. 77 R. 78 82

230. EXPENSES OF A WITNESS.—In order to prevent an *unreasonable* demand as to the procuring of witnesses, the person requiring them may be called on to defray the cost of attendance. R. 77

The ordinary expenses of either civil or military witnesses who do not live within a short distance of the place where the trial takes place may be given in accordance with the scale laid down in the Army Allowance Regulations of 1881 (564–573).

The amount allowed to civilian witnesses abroad is settled by a Treasury minute of 1833. Sm. 906

231. COMPETENCY OF WITNESSES.—A *competent* witness is not necessarily a *credible* witness, nor does it follow that because a witness is competent he is necessarily obliged to give the evidence he is asked for. Every person is competent to give evidence as a witness before a court-martial, with the following exceptions.

1. *The prisoner or any prisoner being tried jointly with him.* Sm. 918

A prisoner can make any statement in his defence, and can call witnesses to prove it, but he cannot himself be sworn to give evidence on the charge upon which he is arraigned (except as provided in S. 156).

If the prosecution require the evidence of a prisoner who is jointly arraigned with another, he should be acquitted, pardoned, or separately tried and convicted first. 243 253

If a prisoner requires the evidence of another prisoner who is being tried with him, he can demand a separate trial if the nature of the charge admits of it, in R. 15

which case the evidence of the prisoner who is not being tried becomes admissible.

2. *The wife of the prisoner or of any prisoner tried jointly with him.*

Husband and wife are not competent to give any evidence tending directly or indirectly to criminate each other, except in those cases where violence or bodily injury inflicted by one on the other is the offence charged. **243**

There is another singular exception to this rule, by which a wife can give evidence against her husband for unlawfully purchasing regimental necessaries. S. 156

3. *A person* who, in the opinion of the court, is, on account of extreme youth, want of understanding, or other causes, *unable to understand the obligations of an oath*, or give a rational answer to questions asked him.

4. A *member of a court-martial* or the judge-advocate cannot be a witness for *the prosecution* (but may be for the defence). S. 50 **64** **71**

232. APPEARANCE OF WITNESSES.—As soon as a court formally opens, the prisoner and the witnesses are brought in and listen to the preliminary proceedings. **84** After the members are sworn and before the prisoner is arraigned on the charge, the witnesses (other than the prosecutor or a member of the court) are ordered to withdraw. **93** Witnesses should not be again allowed to enter the court until they are called on to be examined. R. 79 **246A**

233. OATH OF WITNESS.—Witnesses before being examined must be duly sworn. The usual form of oath and declaration is similar to that used in a civil court. An oath or declaration is administered in such a form and with such ceremonies as a witness may deem most solemn and binding. Ordinarily a witness after repeating the oath kisses the Bible, which is held in his right hand. With a Roman Catholic the book should be closed and R. 80 R. 80

have a cross marked on the cover, or he may be sworn on a crucifix. Jews are sworn on the Old Testament with their heads covered. Sikhs are sworn on the Grünth. Mahommedans and Hindoos are usually allowed to make a solemn affirmation. Sm. 447

Refusal to be sworn.—A witness who refuses to be sworn, or to give any evidence that may be legally required of him, can be punished according to his position either by a military or civil court. S. 28 S. 126 190

234. PROSECUTOR AS WITNESS.—The prosecutor may be called as a witness either for the defence or the prosecution, but it is very undesirable that an officer who is likely to be called upon as a witness should be prosecutor. 68 Sm. 472

As the prosecutor is necessarily present during the examination of all witnesses, it is obvious that if called upon to give evidence for the prosecution he should be examined as the first witness. He should not as a rule be required to give evidence except upon some purely formal matter, to prove a date, or to produce documents. R. 38

There may arise on active service or in exceptional cases instances where the prosecutor is of necessity a material witness for the prosecution. Care should then be taken that all statements made by him as a witness are kept distinct from any address he may make as a prosecutor.

His evidence as a witness for the prosecution would necessarily be in a narrative form, as there is no one to examine him. He can of course be cross-examined by the prisoner. Sm. 571 R. 38

(*Vide* court-martials on Paymaster Francis and Lieutenant Cameron, Sm. 869, 870.)

When counsel appears on behalf of the prosecutor the latter is deposed as it were from his position, and is subject to examination like any other witness. 70 R. 87

The prosecutor is not debarred from giving evidence as to previous convictions. 253

235. MEMBER AS WITNESS.—It is advisable not to place any officer on a court-martial whose evidence as a witness is likely to be required

The judge-advocate or any member of a court *cannot* be a witness for the prosecution, but may be a witness for the defence. If a member of a court is called upon to give evidence for the defence, he is treated like any other witness, is duly sworn, and is subject to cross-examination. S. 50

236. PROSECUTOR'S WITNESSES.—The prosecutor is not bound to call all the witnesses whose evidence is in the summary or abstract of evidence given to the prisoner, but the latter has a right to ask that any such witness whom he may desire to cross-examine shall, if practicable, be present. R. 74

If a prosecutor calls a witness whose evidence is not contained in the summary or abstract, reasonable notice should be given to the prisoner, and if notice has not been given the prisoner may demand an adjournment of the court in order to prepare his defence. R. 75 81

As a matter of justice, no witness should be called by the prosecution and examined unless the prisoner has been previously acquainted with his name either by the convening officer or prosecutor.

237. PRISONER'S WITNESSES. — A prisoner should be asked for a list of the witnesses he wishes to call in his defence not less than 18 hours before the assembly of a regimental court-martial and 24 hours before that of any other court, and the convening officer or president is responsible that their attendance is if possible secured. R. 14 81 R. 77

If the exigencies of the service do not permit of so long a warning being given, a written declaration to that effect must be laid before the court-martial, and as long a time as possible afforded to procure the witnesses. R. 102

If the prisoner desires to call a witness whose name he has not given in the list, he is himself responsible for procuring his attendance. R. 76

The prisoner is not bound to inform the prosecutor as to the number or names of the witnesses he intends to call.

The prisoner should have as free communication with his witnesses as is compatible with military discipline and the circumstances of the case. R. 13, R. 102

238. QUESTIONING WITNESS. — The examination of a witness is conducted by means of questions put orally by the prosecutor, prisoner, or judge-advocate. R. 81

The only exception to this rule occurs when a prosecutor is himself a witness for the prosecution, and gives his evidence as the first witness in the form of a statement.

The evidence is usually taken down in a narrative form in as nearly as possible the words used, but if the court or any of the parties to the trial think it necessary, each question and answer should be taken down verbatim. R. 93

The court or either of the parties who do not put the question may raise an objection to it. If objection is made the witness withdraws until it is decided whether the question may or may not be put. R. 79

At any time before the closing of the defence the president may, with the permission of the court, put any question to a witness that is suggested to him by the judge-advocate or a member of the court. As a rule, questions would be put at the close of the examination of a witness, and before another is called. The court may also ask any reasonable question at the request of the prosecutor or prisoner. R. 83

Reply.— The witness in all cases addresses his reply to the court. R. 81

Correcting evidence.—The evidence of each witness is

read out to him after he has finished, and he is asked if it is correct. Any minor alterations are, if necessary, made and verified by the initials of the president, and any material alterations are appended to the end of the statement, but there should be no erasure of the original record. An explanation made by a witness renders him liable to be cross-examined or re-examined with regard to it.

239. RECALLING WITNESSES.—When a prisoner calls witnesses as to character the prosecutor *has a right* to call or recall a witness for the purpose of proving former convictions against him. R. 84 R. 39 104

The court may for its own information, or at the request of the prosecutor or prisoner, call or recall a witness at any time before the finding, provided the court is reopened. 115 66

Witnesses should not be called or recalled to give any material evidence *after the defence is closed*, as the fact of so doing gives the right of reply, and is liable to cause confusion in the proceedings.

The court 'would do well to act on the principle that the recall of a witness, whom the prosecution and defence have already had full opportunity of questioning, should be distinctly for the satisfaction rather of the court themselves than of either party, and especially not with the object of supplying the omission of a prosecutor to prove a material part of his case.' O'D. 9

Witnesses would be called or recalled generally to clear up some doubtful point in the evidence already given, or in spécial cases to enable the prosecutor to rebut some new matter unexpectedly brought forward by a witness for the defence, or to re-establish the credibility of his witnesses which has been impeached. Sm. 600 603

The evidence in reply must be strictly confined to the *new matter* introduced, and the witnesses recalled are liable to cross-examination.

240. EXAMINATION OF WITNESS.—The examination of a witness by the party calling him is called the *direct* examination, or the *examination in chief*.

Cross-examination.—The opposite side have then a right to *cross-examine* the witness with a view of shaking his evidence.

Re-examination.—At the conclusion of the cross-examination the party producing the witness may *re-examine* him, but the re-examination must be directed to the explanation of matters referred to in cross-examination. If new matter is introduced in re-examination by permission of the court, the adverse party may further cross-examine on that matter.

241. EXAMINATION IN CHIEF.—When a witness is 253
being examined in chief all questions put must be strictly relevant to the points at issue, and he must not be asked leading questions on material points.

Leading questions.—A leading question is one suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify.

Leading questions can nearly always be answered by 'yes' or 'no.'

For example: 'Did you see A strike B at the corner of Park Lane at noon on the 15th instant?' would be a leading question, as it suggests the evidence required, which is that A struck B at a certain place. On the other hand, it might be fairly asked, 'Where were you at noon on the 15th?' 'Did you notice any fighting or assault?' 'Are the persons you saw fighting now in court?'

When admissible.—Leading questions as to points that are not material or merely introductory are generally admitted to save time. For example, a soldier might be asked, 'Were you in No. 1 room on the morning of the 10th instant?' when it is not disputed that he was there.

Leading questions are admissible in order to help a very youthful or unintelligent witness, or to aid the memory. In all such cases the court must use their discretion in allowing the question to be put.

When it is apparent that a witness is unwilling to give testimony, and will not answer direct questions, the party producing him may, by permission of the court, treat the witness as a hostile one, and subject him to cross-examination and ask him leading questions.

After an ordinary direct examination has failed to elicit distinct replies as to the identification of a person or thing, it is permissible to produce such person or object in court, and ask the witness if he can identify it.

Refreshing memory.—Witnesses must be examined orally, and may not read their evidence. They may, however, refresh their memory by reference to notes or writings, but such writings or notes must be produced, and the witnesses are liable to cross-examination in reference to them.

The notes or writings referred to are not in themselves evidence, and hence the witness, after his memory has been refreshed, must swear as to the facts, and not merely state that they are referred to in certain pages (which is hearsay evidence).

242. CROSS-EXAMINATION.—When the examination in chief is finished, the opposite side can cross-examine the witness. The object of cross-examination is to test the accuracy of the evidence already given in every possible way, or show that the matter in hand may be viewed in a different light. It is not limited to the matter brought forward in the direct examination, but extends over all subjects relevant to the case as a whole. As a rule, cross-examination is directed to discredit the evidence given or the person who has given it, and great latitude is allowed in putting questions.

Leading questions.—Leading questions may be put to try to make the witness contradict himself.

Irrelevant questions.—Irrelevant questions are admissible in cross-examination, and are used for the purpose of throwing a witness off his guard. Though the questions put need not be relevant to the matter upon which the witness has been examined, they must be relevant to the main issue before the court. It is not allowable to cross-examine on facts which have nothing to do with the case, or do not tend to shake the credibility of the witness; nor can it be assumed that facts are proved which have not been proved, or that answers have been given which have not been given.

Degrading questions.—Questions may be put to test the veracity, accuracy, or credibility of a witness, or to shake his credit by injuring his character.

The power of casting imputations on a witness's character is, however, somewhat limited before courts-martial. If a counsel asks a question with the intention of injuring the credit of a witness, and the witness objects to answer, the court may disallow the question if they think that the imputation, if true, would not seriously affect the opinion of the court. R. 90 280

As to previous statements.—A witness may be asked whether he has on a previous occasion made a statement relative to the subject-matter of the action, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion; and if he does not admit that he has made such a statement, proof may be given that he did make it. Sth.131

The previous statement may have been made in writing, and questions may be asked concerning it without showing the writing in question. If, however, it is intended to contradict the witness's testimony by producing the writing, it must be shown to the witness before the contradictory proof can be given. Sth.132

243. PRIVILEGE AS TO ANSWERING.—A witness before a court-martial is in a similar position to one before a civil court, and the court is bound to protect him from insult, or from questions put in a needlessly offensive form. Witnesses who are competent are, however, bound to answer all questions put to them except in the following cases.

Criminating answer.—No witness is bound to answer a question if the answer thereto would, in the opinion of the court, render the witness (or the witness's husband or wife) liable to be tried on a criminal charge. S h.120

Accomplices in an offence can therefore not be examined without their consent, and a bargain is usually made with them to turn 'Queen's evidence.' 231 Sm.962

The privilege of refusing to answer would not apply where the answer would render a witness liable merely for a civil action for debt, &c. Sm.967

Degrading answer.—When a question tends to degrade a witness the court can exercise its discretion in compelling him to answer, and should refuse to compel a question to be answered unless it appears that the truth of the matter suggested would affect the credibility of the witness as to the matter in issue. Sth.129

Professional secrets.—Legal advisers are not bound to answer questions as to confidential communications made to them by their clients (information with respect to a contemplated fraud being excepted). Sm.930

Official secrets.—A witness is not bound to answer questions as to *official* information of a confidential character, or disclose matters prejudicial to the public interest. Sm.931

Husband and wife.—Husband and wife cannot be forced to disclose communications which one has made to the other during marriage. 231

Questions, whether answered or not, should be entered on the proceedings. When a witness is not bound to answer a question the court should inform him of his

right not to answer, which the witness can avail himself of or not as he thinks fit.

244. CONTRADICTION OF ANSWERS.—When a witness is asked questions which only tend to shake his credit or injure his character, the answer must be received whether true or not, and cannot be contradicted. Sth. 130

There are, however, two exceptional cases:

1. When a witness is asked whether he has been previously convicted of a felony or misdemeanour, and denies it or refuses to answer.

2. When he is asked a question tending to show that he is not impartial, and he denies the facts suggested.

In these cases evidence can be given of the truth of the matter suggested.

245. IMPEACHING CREDIBILITY OF WITNESS.—The credibility of a witness may be impeached— 231

1. By producing evidence to contradict him; but in such a case the witness before cross-examination should be made acquainted with the substance of the evidence to be produced.

2. By making him contradict himself.

3. By bringing witnesses to swear that they, from their knowledge of the witness, believe him to be unworthy of credit on oath. The reasons for the belief should not be stated, but may be elicited in cross-examination.

The party, the credit of whose witnesses is impeached, may give evidence in reply to re-establish their character.

246. CONTEMPT OF COURT.—A witness subject to military law who is guilty of any contempt of court can be tried for *contempt* by a court other than that before which the offence was committed, or if he insults the court or disturbs the proceedings can be imprisoned by 190 228 233 S. 28

its order under the hand of the president for a term not exceeding twenty-one days.

If a person not subject to military law commits a contempt of a military court, the president may, under his hand, certify the offence to any civil court which has the power of dealing with such an offence, and that court may punish the witness in like manner as if he had committed the offence against itself. S 126 S. 180

246A REMARKS.—In order to prevent collusion, no witness is permitted to be present during the examination of another witness. This rule, however, is not so rigidly observed as to exclude the testimony of those who by inadvertence have been allowed to listen to the examination of others, although their evidence should be received with caution. After the cross-examination of witnesses has been concluded, it is competent for a court to *confront* conflicting witnesses and allow them to repeat their evidence in each others' presence, if the court are of opinion that by such a course inconsistencies may be the more easily reconciled and the truth more readily arrived at.

CHAPTER XXV.

EVIDENCE.

247. INTRODUCTORY REMARKS. 248. EVIDENCE—Direct—Circumstantial. 249. FACTS NOT REQUIRING PROOF. 250. FACTS REQUIRING PROOF—Substance of Charge—Alteration in Finding. 251. THE BURDEN OF PROOF—Presumption—Of Criminal Intent—Of Theft—Other Presumptions. 252. RULES OF EVIDENCE. 253. RULE OF RELEVANCY—Offences connected together—Facts showing Intention—Facts showing Motive—Cases of Conspiracy—General Disposition irrelevant—Character irrelevant. 254. RULE OF BEST EVIDENCE—Secondary Evidence—One Witness sufficient—Documentary Evidence—Public Documents—Private Documents. 255. RULE AS TO HEARSAY—Dying Declarations—Statements as part of *res gestæ*—Depositions—Public Documents—Confessions. 256. RULE AS TO OPINION—How far admissible—Experts. 257. ADMISSIONS. 258. CONFESSIONS—When Involuntary—When Voluntary—Proof of Facts revealed—Previous Confessions. 259. REMARKS.

247.[1] **INTRODUCTORY REMARKS.**—The rules or laws of evidence were originally framed with reference to trial by jury, and it is laid down that the rules which guide courts-martial in admitting or rejecting evidence should be the same as those used in the ordinary civil courts of criminal or summary jurisdiction. S. 127 S. 128 R. 72

In trials by jury persons unacquainted with law give

[1] A fuller exposition of the law of evidence is to be found in the official text-book on military law, the general plan of arrangement of which has been followed.

a verdict as to the matters of fact alleged in the charge, and the judge pronounces the sentence which is the legal consequence of the verdict.

In trials by court-martial the members of the court form both judge and jury, and have both to decide as to facts and award a sentence.

In order to decide on questions of fact it is necessary for a jury to hear the evidence or testimony upon which the charges are founded, and from which they are proved.

The judge has to assist the jury in coming to a fair decision, provide that the prisoner has no injustice done to him, and prevent time from being wasted by matters irrelevant to the issue tried being entered into. The rules or laws of evidence in accordance with which a judge guides a jury and regulates the manner in which testimony is brought forward are in principle those which must be followed by members of a military court in the reception of evidence.

248. EVIDENCE is the testimony upon which facts are believed, and consists of—

1. Statements made by witnesses in court under legal sanction in relation to matters of fact under inquiry, or *oral* evidence. Sth. 2 238

2. Documents produced for the inspection of the court, or *documentary* evidence.

In all judicial inquiries the information must be given on oath, and be liable to be tested by cross-examination.

Evidence may be either *direct* or *indirect*.

Direct evidence is the statement of a witness who testifies as to his personal observation of the facts in question.

Indirect or *circumstantial* evidence is testimony as to certain facts from which the facts in question may be inferred or presumed.

Before deciding upon the difficult question as to what

statements or documents are legally admissible as evidence, it is necessary to make clear what has to be proved and who has to prove it.

249. FACTS NOT REQUIRING PROOF.—Certain facts are assumed to be judicially known. It is not necessary to receive proof as to facts which courts are bound judicially to recognise, such as the existence of Acts of Parliament, or military regulations, or to require evidence in matters which an officer may reasonably be expected to know, or on facts which are generally admitted as being beyond controversy.

250. FACTS REQUIRING PROOF.—*It is sufficient to prove the substance of the charge* in connection with the specific offence for which a prisoner is being tried, and there are usually certain allegations which do not materially affect the validity of the charge. For instance, it may be apparent that there is an error in the names, dates, or places mentioned in the particulars of the charge, or a man may be charged with using insubordinate language, and it may appear that there is some slight discrepancy as to the actual words used. In such cases the court has 119
the power of either amending the charge in respect of 221
the name or description of the prisoner, or recording a special finding, and may be content with receiving only sufficient evidence to convince them that a mistake has been made. The time of the court need not be taken up in receiving a quantity of evidence on a point which is not material to the actual offence charged.

Alteration in finding.—In some cases the proving of 119
the substance of the charge may lead to a prisoner being convicted of an offence technically similar to or less serious in degree than that with which he is charged. For instance, in a case of murder, the killing of a person S. 56
is the essence of the charge, but the evidence may go to

prove that it was not done 'wilfully with malice aforethought,' and the crime is thus reduced to manslaughter. Again, in the case of desertion, the substance of the offence is the absence of the man, and hence, if intention not to return is not proved, he can be found guilty of absence without leave.

A person charged with stealing can be convicted of embezzlement, and *vice versâ*.

251. THE BURDEN OF PROOF.—He who affirms a fact must prove it. If a prisoner be charged with drunkenness, it is for the prosecutor to prove that he was drunk, and not for the prisoner to prove that he was sober.

Presumptions.—There are certain rules of law called Sth. 1
presumptions which justify a court in drawing a particular inference from a particular fact or evidence, and the existence of these presumptions or affirmations of the law cause the burden of proof to be shifted in some cases from the prosecutor to the prisoner.

Presumption of criminal intent.—When a man commits an unlawful act, it is *presumed* that he meant to do it, and it rests with him to prove that he did not intend to do it. Thus a prisoner is tried for killing a man, which is an unlawful act. The law presumes that he meant to kill him, and it is for the prisoner to prove that the death arose from accident or in self-defence.

When an act, which is not in itself unlawful, leads to the commission of an offence, it will rest with the prosecution to prove the intention to commit the offence. For example, a soldier is at target practice, which is a lawful act, and his bullet strikes a bystander near the target. It will be for the prosecution to show that the soldier fired with intent to kill, or was culpably negligent in not taking sufficient precaution.

Presumption of theft.—Again, a quantity of property **217**
known to have been stolen is found in a person's house. A guilty knowledge concerning the theft is presumed, and

it rests with the receiver to prove that the articles were innocently received.

Other presumptions.—There are many other presumptions, of which the principal are—

1. That every man is innocent till the contrary is proved.

2. That all necessary things have been done; for instance, on the trial of a soldier it is presumed that he has been attested.

3. That every one is acquainted with the law. Ignorance is no excuse. When an order is issued, it is presumed that it has been made known to all whom it directly concerns.

4. When an action is done which is injurious to another, *malice* is presumed.

5. A child born in wedlock is presumed to be legitimate.

6. A letter properly addressed and posted is deemed to have been received.

7. A person who has not been heard of for seven years is presumed to be dead.

When a presumption exists, it will rest with the party who denies the facts to prove that the presumption is not correct.

252. RULES OF EVIDENCE.—There are many rules or maxims of evidence which are mainly of a negative character, and lay down the sort of evidence which must be excluded from consideration. Of these the principal are—

I. Nothing shall be admitted as evidence which does not tend either directly or indirectly to prove or disprove the charge, or (in other words) the evidence must be confined to the points at issue.

II. The best evidence must be produced which the nature of the case admits of.

III. Hearsay is not evidence.

IV. Opinion is not evidence.

253. RULE OF RELEVANCY.—*Nothing shall be admitted as evidence which does not tend either directly or indirectly to prove or disprove the charge*, or (in other words) *the evidence must be confined to the points at issue.* The points or facts at issue are those affirmed by one side and denied by the other, and the evidence must be relevant to the facts at issue. There is considerable difficulty in drawing the line between 'relevant' and 'irrelevant' facts, as matters apparently unconnected with the charge may indirectly bear upon it.

Evidence which does not directly bear on the charge is relevant in the following cases:—

Offences connected together.—When several offences are connected with each other so that they form part of one transaction, evidence of one offence is admissible in proof of another. A prisoner, however, is charged with a specific offence, and any evidence as to other offences must only be entered into sufficiently to prove some part of the charge, and no more.

In a charge for stealing certain articles it is not necessary to inquire into the stealing of goods not mentioned in the charge, but evidence might be taken as to how goods stolen from the same premises the same night were found in the possession of the prisoner, as it would afford a strong proof that the prisoner was at or near the premises in question at the time mentioned in the charge. Again, in the case of a prisoner being tried for setting a house on fire, evidence might be received that articles belonging to the house were found to be secretly in the prisoner's possession.

On a charge of desertion it may be admissible to inquire into the *fact* (but not the attendant circumstances) of a highway robbery being committed by the prisoner, as it would tend to show that he was absent, and did not intend to return. In cases of desertion, again, evidence may be received as to the prisoner selling his uniform, buying plain clothes, &c., in order to prove that he had the intention of leaving the service.

Facts showing intention.—Facts showing the intention or state of mind of the prisoner are generally admissible, provided they do not refer to the general character or disposition of the prisoner, but are strictly confined to the matters mentioned in the charge.

A prisoner, A, is tried for the murder of B. Evidence could not be received that A had previously murdered C or other persons, but a former attempt to murder B might be brought forward as proving an intention to murder him.

Facts showing motive.—Evidence showing the motive of the prisoner or suspicious conduct after committing a crime is admissible. For instance, in a case of burglary, it might be proved that the prisoner absconded, or that he had hidden the tools with which he had committed the offence.

When a prisoner is tried for murder, evidence might be received that he held a policy of insurance on the murdered person's life.

Cases of conspiracy.—In cases of conspiracy the acts, 231
statements, or writings of any one of the conspirators can 243
be brought in evidence against the others, but care must be taken that the evidence in question is confined to the act or plan of conspiracy charged.

In the following cases evidence is not admissible :—

As to general disposition.—Evidence as to the general disposition or tendency of a prisoner to commit a crime is not admissible. In cases of insubordination it would not be right to prove that the prisoner had been previously insubordinate on other occasions.

Courts-martial have generally, in cases of drunkenness, 187
to receive evidence of previous instances, but this is done for a certain purpose, and must not influence the court in finding a man guilty of the particular act charged.

As to character.—A man must not be convicted of Sth. 56
an offence because he has a bad name. The prosecution cannot, therefore, give evidence as to character as showing a prisoner's guilt. If, however, a prisoner calls R. 39

witnesses as to his good character, the prosecutor may prove the fact of there being previous convictions against him. A prisoner can always bring evidence in favour of his good character, which the court must weigh in proportion to its relevancy. R. 84 239 101 123

254. RULE OF BEST EVIDENCE.—*The best evidence must be produced which the nature of the case admits of.*—The meaning of this rule is that no evidence shall be admitted which leaves ground for supposing that other and better evidence remains behind in the possession or power of the party producing it.

The best evidence may be either *direct* or *circumstantial*.—In admitting the latter it is useful to remember that the 'facts on which it is sought to found the inference of guilt must be vividly and evidently connected with the crime.' 248

Secondary evidence.—When the best legal evidence is proved to the court to be unattainable, then, and then only, is the next best or *secondary* evidence admissible.

The deposition on oath of a witness could not be received unless the attendance of the witness himself has been proved to be physically impossible. 255

The law lays down that the evidence shall be the best, but does not define the amount to be received.

One witness sufficient.—To prove a fact the evidence of one credible witness (except in cases of treason and perjury) is enough, provided that it satisfy the court. If a soldier struck an officer on parade, the evidence of one or more men who actually saw the blow would be the *best* evidence, and the testimony of the remainder of the soldiers on parade it would be unnecessary to receive. Sth. 122

Documentary evidence.—There is little difficulty in applying the rule as to the best evidence, except in the case of documentary evidence. As a general rule, no copy or verbal account of the contents of a document can be received if the original document itself can be produced.

To this rule there are, however, many exceptions, of which the principal one is that public documents can always be proved by secondary evidence.

Public documents.—Public documents are held to be the acts of public functionaries in the execution of their business, and are receivable as such by virtue of Parliamentary statutes. They include Acts of Parliament, Acts of foreign or colonial states, proclamations or orders of the Crown, judgments of courts, official and public records, documents of corporations and companies, bye-laws, entries in registers, and other books of a public nature.

The public documents admissible as to the facts therein contained, either directly or by means of duly attested copies, which are referred to in the Army Act, include—

1. Papers in reference to attestation and enlistment. S. 163

2. Papers in reference to a man's service or discharge.

3. Army lists, warrants, orders, Queen's regulations, army circulars, and official rules and regulations and gazettes printed by Government.

4. Notices addressed to Army Reserve men.

5. Descriptive returns.

6. Proceedings of courts-martial.

7. Certificates of civil convictions.

8. Records in the ordinary regimental books, which include the declaration of a court of inquiry on illegal absence, and confession of desertion and fraudulent enlistment. S. 72 S. 73 279

Private documents.—Private documents are all letters, official or private, private accounts, receipts, &c., and any papers which do not come under the head of public documents.

Private writings are the written statements of persons not on oath nor liable to cross-examination. Hence they are subject to the rules governing hearsay evidence. A copy of the marriage register, which is a public docu-

ment, is, if duly attested, a proof of marriage; but a letter from a clergyman stating that he had solemnised a marriage could not be accepted.

Private writings may, however, be used to prove a prisoner's motive or intention, or may be admitted as proof of a document having been written, when writing the document is the essence of the charge. For example, the best evidence of having written an insubordinate letter is the letter itself.

When private writings are brought before a court, the originals must be produced, and the handwriting, if not admitted, must be proved.

Copies of private documents are only admissible when the originals are lost or destroyed, or are in the possession of the opposite side or persons not bound to produce them, or when from their nature, bulk, or locality, they are unable to be moved or procured, or when they are specially exempted, as in the case of a banker's book. (Banker's books evidence, Act 1879.)

A prosecutor may be required to produce documents at the instance of the prisoner. A prisoner cannot be required to produce evidence against himself, but if he refuses to produce documents after reasonable notice, secondary evidence of their contents may be given. Sm. 899

255. HEARSAY IS NOT EVIDENCE.—Hearsay evidence means the statements, whether in writing or not, made in the absence of the prisoner by persons not called as witnesses, and who, therefore, are not on their oath nor liable to cross-examination.

There are a few exceptions to this rule, of which the most important are—

1. *Dying declarations.*—In trials for murder and manslaughter a declaration made by the person killed *as to the cause of his death* is admissible, provided it be proved that he fully believed he was in actual danger of death, and had given up all hope of recovery. Sth. 26

2. *Statements as part of res gestæ.*—Res gestæ are the acts or transactions which are the subject of investigation. Where statements are so immediately connected with an offence as to be considered virtually a part of the res gestæ, or the immediate and natural effect of them, they are admissible. Sth. 11

For instance, statements showing the bodily or mental condition of a person, provided they are relevant to the issue, are admissible. For example, in a poisoning case, statements made by the invalid during his illness as to his state of health would be received.

Again, statements or writings with reference to the charge, made by a deceased person in the ordinary course of professional business, would be admitted. Where a letter had been destroyed, a copy taken by a deceased clerk in the usual letter-book would be evidence of its contents. Sth. 27

In cases of rape and robbery, or any criminal offence, the fact that a complaint had been at once made after the offence was committed would be admissible, though the terms of the complaint would not. Sth. 8

3. *Depositions*, or the duly attested written statement of a witness who is unable to attend from death or illness, and who gave the statement on oath in the presence of a justice and of the prisoner who had an opportunity of cross-examining him, are admissible when a court-martial is trying civil offences under S. 41.

Depositions are not as a rule received by courts-martial, but military courts have the power not possessed by civil ones of adjourning to the abode of a sick person.

The summary of evidence which is of the nature of a deposition cannot be admitted as evidence of the facts therein contained. If the summary, however, purports to give the verbatim statement of a witness, it can be produced in evidence as *confirmatory* of the statement having been made or brought forward to show that the witness has contradicted himself. The summary of evidence of a witness who is not before the court cannot of course be referred to.

4. *Public documents.*—Certain public documents before mentioned are made by statute evidence of the facts to which they relate.

5. Admissions and confessions can in certain cases be received with some restrictions. 257 258

256. OPINION IS NOT EVIDENCE.—The general opinion of a witness as to the facts in issue is not admissible in evidence. For instance, in a case of desertion the evidence of a witness would be taken as to the facts of illegal absence, &c., but the *opinion* of the witness that the prisoner had deserted would not be received, as that is an inference to be determined by the court. Sth. 48

How far admissible.—This rule does not include evidence which from its nature cannot always be sworn to positively. Thus, for instance, a witness may swear as to the identity of a person or thing to *the best of his belief*.

Similarly, opinion can be received as to the conduct of an accused person, or his deportment or language in reference to facts beyond the knowledge of the court. A witness might testify that he saw the prisoner at a certain time, and that in his opinion he was drunk.

When facts cannot be sworn to positively, a witness who falsely swears he 'thinks' or 'believes' some fact is true is liable to be convicted of perjury.

Experts.—The principal exception to this rule as to opinion, is the opinion of an expert, which can be received on any point within the range of his special knowledge. In a poisoning case a doctor may give his opinion that a certain poison produces certain symptoms, but he could not give his opinion that the death in question was accompanied by those symptoms unless he perceived them himself as an ordinary witness. Sth. 49

The opinion of an expert in handwriting, or a person acquainted with a particular handwriting, may be received. Sth. 51

257. ADMISSIONS.—Admissions, as distinguished from confessions, can only be received by courts-martial as to collateral or comparatively unimportant points which are not in dispute. It is the practice to allow either party to admit the authenticity of orders or letters, or the signature of a document, or the truth of a copy in cases where the original writing is receivable when proved, or that certain items in an enumeration of stores or in an account are correctly stated, or that a promise or order was actually given, or a certain letter sent and received, or in other similar cases when admissions may expedite the proceedings, and do not go into the merits of the matter before the court. Sm. 991

258. CONFESSIONS.—Confessions, *if voluntary*, are deemed to be relevant, but only against the persons who make them.

If any part of a confession is given in evidence, the whole must be received, and not merely the portion disadvantageous to the prisoner.

When involuntary.—No confession is deemed to be voluntary if it appears to have been caused by any threat, inducement, or promise proceeding from a person *in authority*, and if in the opinion of the court such threat, inducement, or promise gave the accused person reasonable grounds for supposing that he would gain some advantage in reference to the proceedings against him. Sth. 22

The inducement must have some reference to the prisoner's escape from the charge made against him, and must be made by a person who has some power in relieving him either wholly or partly from the consequences of the charge, such as a constable, magistrate, prosecutor, and in some cases the person against whom the offence was committed.

When voluntary.—A confession made in consequence of inducements held out by persons not in authority, or caused by religious exhortation, or by inducements which

have no reference to the prisoner's escape from the charge, are deemed voluntary.

Thus a gaoler, who is a person in authority, states to a prisoner that a pardon has been promised to any one who confesses. The confession made in consequence is deemed involuntary, and cannot be received. If, however, the gaoler promises the prisoner that he will allow him to see his wife if he confesses, the confession is voluntary.

A confession is not inadmissible because it was made under promise of secrecy, or in consequence of deception, but a court-martial would seldom receive any confession obtained by fraud, though they might legally do so.

Proof of facts revealed.—Although an involuntary confession cannot be received in evidence, yet if such confession reveals a certain fact, that fact can be proved. For example, a person, accused of burglary, makes a confession to a policeman under circumstances which prevents it being received. In it he states that he threw a lantern into a pond. The fact that he said so, and that the lantern was found in the pond, may be proved. Sth. 22

Previous confessions.—Evidence in the nature of a confession given in previous proceedings may be used against the person who gave it. Thus a statement of a prisoner to his commanding officer acknowledging an offence might be received in evidence at a subsequent trial.

259 REMARKS.—The rules of evidence are not very strictly observed by courts-martial. The majority of officers have had no legal training or experience, and it is advisable to allow considerable latitude in the reception of evidence. The issue to be tried is generally so clear, and the proceedings of the court occupy so little time, that evidence, unless very clearly irrelevant, should be received if either side wish it. In the interests of justice, and to save waste of time, general principles should, however, be adhered to, and may be summed up as follows :—

1. The evidence must be relevant to the issue, and the best procurable.

2. It must not be in the nature of hearsay or opinion.

3. Confessions, admissions, or documents must be legally admissible, and the latter should be properly verified if put in evidence or otherwise used.

4. The witnesses must be legally competent, and their examination properly conducted.

CHAPTER XXVI.

SUMMARY AND FIELD GENERAL COURTS-MARTIAL.

260. SUMMARY COURTS-MARTIAL—Provost-marshal. 261. CONVENING OF COURT. 262. COMPOSITION OF COURT. 263. FORM OF PROCEEDINGS. 264. PROCEDURE—Challenge—Swearing of Court—Charge—Plea—Prosecution—Defence—Finding—Sentence—Recommendation to Mercy. 265. CONFIRMATION. 266. REVISION. 267. GENERAL PROVISIONS—Voting—Remand of Prisoner—Remarks. 268. FIELD GENERAL COURT-MARTIAL. 269. CONVENING OF COURT. 270. COMPOSITION OF COURT. 271. POWERS OF COURT. 272. PROCEDURE.

260. SUMMARY COURTS-MARTIAL.—Summary courts-martial have been instituted for the purpose of trying offences committed *on active service*, which, with due regard to the public service, could not be tried by the ordinary courts.

They can try any person subject to military law for any offence, and can award the punishments of a district or general court-martial, according as they are composed of two or more officers.

Provost-marshals.—The speedy trial and punishment of offenders by these courts renders it unnecessary to give provost-marshals any power of punishment, and the functions of these officials are now strictly limited to carrying out the execution of sentences. S. 74

261 CONVENING OF COURT.—A summary court-martial may be convened by a commanding officer, a field officer in immediate command, or, when delay for the purpose of S. 55 R. 104

reference is not practicable, by any officer in immediate command of troops.

262. COMPOSITION OF COURT.—The court must consist of not less than three officers, unless the convening officer is of opinion that three officers are not available, and that delay is not practicable, in which case two may be appointed. The convening officer may if other officers are not available appoint himself president. If practicable, the president should not be below the rank of captain, and the members should have not less than three years' service (but in no case less than one). A provost-martial, prosecutor, or witness for the prosecution cannot sit on the court. R. 105

263. FORM OF PROCEEDINGS.—The form of proceedings as laid down for field general courts-martial should be adhered to as closely as possible. If the convening officer is satisfied that military or other exigencies prevent compliance with Rule 103, the proceedings may be recorded in the form laid down in App. II. It will be noticed that these proceedings consist merely of a formal order convening the court, a certificate from the president that the trial was duly carried out, and a formal confirmation. In a schedule is inserted the name of the offender, the offence charged, the plea, finding, sentence, and confirmation. 272 R. 103

If military exigencies in the opinion of the convening officer do not admit of the above simple form being used, the court may be convened and the proceedings carried out without any writing. The provost-marshal, however, if present, and if there is not one, both the president and the officer charged with promulgation, must keep a record adhering as far as possible to the official form; and in it must be noted *at least* the name of the offender, the offence charged, the finding, sentence, and confirmation.

In all cases when military or other exigencies prevent compliance with R. 103, or the use of the form in App. II., a special report must be made to the officer who, if a summary court had not been convened, would have had power to convene a general court-martial to try the prisoner. G.O. 88/86

264. PROCEDURE.—The rules as to field general courts-martial should be followed with the modifications hereafter specially mentioned. The court may be sworn to try any number of prisoners, but each prisoner is tried separately, except in the case of offences committed collectively. R. 103

The court is an open one, and the parties to the trial are brought before it in the usual way.

Challenge.—The names of the officers composing the court are read over in the hearing of the prisoner, and he is asked if he objects to be tried by any of them. R. 109

If any member of the court thinks that an objection raised by the prisoner is reasonable, steps must be taken to constitute a court composed of officers against whom he has no reasonable objection.

Swearing of court.—The president and members are duly sworn. R. 110

Charge.—The charge, which should briefly disclose an offence under the Army Act, is read out to the prisoner by the president, who should give a full verbal explanation as to the exact act or omission charged. R. 107 R. 111

Plea.—The prisoner, on being asked to plead, can either plead 'guilty' or 'not guilty,' or offer a special plea against the jurisdiction of the court. If the latter plea is considered by the court to be valid, they must report the fact at once to the convening officer. R. 112

Prosecution.—The witnesses of the prosecutor are duly sworn, and are examined and cross-examined in the usual way, but the evidence need not be taken down in writing. R. 113 R. 114

Defence.—The prisoner can call any available witnesses in his defence, or make any verbal statement.

Finding.—In the case of an equality of votes the prisoner is acquitted. A finding of acquittal requires no confirmation; and if it refers to all the offences with which the prisoner is charged, he is at once released from custody.

Sentence.—A court composed of three officers has the power of punishment of a general court-martial, but a court composed of only two cannot exceed the powers of a district court-martial. R. 117

If the court pass a sentence of death the whole court must concur.

Recommendation to mercy.—Any recommendation to mercy must be entered in the schedule, and, if practicable, be in addition attached as a memorandum to the proceedings. R. 117

265. CONFIRMATION.—A sentence cannot be carried out until it is duly confirmed. R. 119

A provost-marshal, or an assistant provost-marshal, or a prosecutor can in no case confirm the proceedings.

A member of the court cannot confirm its proceedings unless it is not practicable to delay the case for reference, in which case he may confirm, provided he is a person otherwise qualified to do so.

Any general, field officer, commanding officer, or (where delay for reference is not practicable) any officer in immediate command not disqualified as aforesaid, can confirm up to the powers of a regimental court-martial.

If the sentence awarded is beyond the powers of a regimental court-martial, but is within the power of a district court, it can only be confirmed by an officer having power to confirm district courts-martial.

If a sentence of death or penal servitude is passed, it must be confirmed by an officer having power to confirm general courts-martial, who must also be the general or field officer commanding the force with which the prisoner is serving.

Confirmation of a sentence of death must, if practicable, be reserved for the officer in chief command of the whole of the army in the field.

Any confirming officer may, if he thinks it desirable, reserve a finding or sentence for confirmation by superior authority.

When the punishment awarded by a sentence is such that an officer is required to reserve the same for con-

firmation, that officer may if he thinks fit, instead of referring the case, mitigate, remit, or commute the punishment, so as to make the award one which he has the power to confirm.

266. REVISION.—The confirming officer cannot send back the finding and sentence for revision more than once, and on revision the court cannot take any fresh evidence or increase the sentence.

267. GENERAL PROVISIONS.—*Voting.*—Except in the cases of challenge of members, finding, and passing sentence of death, every question is determined by a majority of votes, and in the case of equality the president has a casting vote. R. 118

Remand of prisoner.—If after the commencement of the trial the court are of opinion that a prisoner should be tried by an ordinary court-martial, they should strike his name out of the schedule and remand him.

Remarks.—The proceedings as to opening and closing the courts, adjournments, mitigation of sentence, confirmation notwithstanding informality, transmission and preservation of proceedings, shall be in accordance as far as practicable with those governing district courts-martial. R. 120

268. FIELD GENERAL COURT-MARTIAL.—The formation of a field general court-martial has been authorised in order to replace the detachment general court-martial, which was originally formed during the Peninsular war for the purpose of putting down the offences of pillage and outrage committed by persons subject to military law against the inhabitants of the country.

269. CONVENING OF COURT.—It may be convened by any officer in command of a body of troops abroad, provided— S. 49

1. That the offence has been committed and is tried in a country beyond the seas (irrespective of whether the country is within or without the Queen's dominions, or whether the troops are on active service or not). S. 190 (25)

2. That the offence is committed against the property or person of the inhabitants of the country.

3. That the offender is a person subject to military law, and under the command of the convening officer.

4. That it is impracticable to try the case by an ordinary general court-martial.

270. COMPOSITION OF COURT.—The court should consist of not less than three officers, without restriction as to rank or corps.

The convening officer may preside if no other officer is available.

The president should not, if practicable, be below the rank of captain.

A prosecutor, witness for the prosecution, or officer personally interested, cannot sit on the court. R. 103

271. POWERS OF COURT.—Subject to the conditions under which the court is convened, a field general court-martial has all the powers of a general court-martial, and can in addition try *civil offences* without restriction of any kind. S. 49

Sentence of death cannot, however, be passed without the concurrence of all the members.

No sentence can be carried out until it is duly confirmed by an officer authorised to confirm general courts-martial for the trial of offences in the force of which the troops under the command of the convening officer form a part. S. 54

272. PROCEDURE.—The procedure to be followed is similar to that used in the case of a general court-martial.

As, however, the object of a field general court-martial R 103

is a speedy trial of offences, certain relaxations are allowed in applying the rules of procedure in order to avoid delay.

1. The summary of evidence need not be prepared. R. 5, 8

2. Instead of a charge sheet the name or description of the prisoner, together with the offence charged, is entered in a schedule which is appended to the order convening the court. Ap. 2

3. The interval between the prisoner being informed of the charge and his arraignment should be as long as possible, but is not otherwise fixed. R. 14

4. A judge-advocate is not required.

5. On a plea of 'guilty' the court shall proceed as in the case of a regimental court-martial.

6. On a plea of 'not guilty,' the rules as to taking and calling witnesses are to be adhered to as far as practicable. R. 38–40

7. The prisoner should be allowed as full an opportunity for preparing his defence as the circumstances admit of. R. 13

8. The proceedings are transmitted and preserved as if the court were a district court-martial. R 95, R. 96

9. The rules as to hours and time of sitting are to be observed so far as the case admits of.

The rules of procedure must in other points be strictly observed, and cannot be further relaxed on the ground of military exigencies. R. 102

CHAPTER XXVII.

COURTS OF INQUIRY, MARTIAL LAW, ETC.

273. COURTS OF INQUIRY—Power—Composition—Proceedings—Inquiry affecting Character. 274. COURT ON ILLEGAL ABSENCE. 275. BOARDS. 276. COURTS OF REQUEST. 277. COURTS OF INQUEST. 278. REDRESS OF WRONGS. 279. RECORDING OFFENCES—Court-martial Books—Regimental Defaulters' Book—Company Defaulters' Book. 280. EMPLOYMENT OF COUNSEL—Their Duties—Statement by Prisoner. 281. MARTIAL LAW—Definitions—Applicable to Soldiers—To a Conquered Country—To a Community in time of Danger. 282. REMARKS.

273. COURTS OF INQUIRY may be assembled by the officer in command of any body of troops for the purpose of aiding him in arriving at a correct conclusion on any subject on which it may be expedient for him to be thoroughly informed. They have no judicial power, and are simply an assembly of persons directed to collect evidence with respect to a transaction into which the commanding officer himself cannot conveniently make inquiry. R. 123 Q. vi 118

They must always be held to investigate the maiming or injuring of a soldier (except by wounds received in action), and the circumstances under which an officer or soldier is taken prisoner by the enemy. In the case of a soldier the inquiry is delayed until he is returned as a prisoner of war. Q. vi. 122 Q. iv. 23

A court must be guided by the written instructions given to it by the convening officer, and should be careful not to exceed them. It may be required to give an opinion

on any point not involving the conduct of an officer or soldier.

A court has no power to summon witnesses nor to take evidence on oath, but military witnesses can of course be ordered to attend by superior authority.

Composition.—Courts of inquiry may be composed of any number of officers of any rank or branch of the service, but three are usually sufficient. The senior officer acts as president, and must be a combatant officer if any of the other members are combatants.

Members of a court of inquiry in a case which is subsequently the subject of a court-martial are not to be detailed as members of the court-martial. 64

Proceedings.—The proceedings of a court are signed by all the members, and if any member differs from the others, he can record his opinion separately. The proceedings are usually kept secret and forwarded at once on completion to the convening officer, who is then in a position to form an opinion on the matter investigated.

The report made by a court is a privileged communication, and the statements made by witnesses are also privileged, and cannot be made the subject of a civil action.

Inquiry affecting character.—When an inquiry affects the conduct of an officer or soldier he must be afforded an opportunity of being present, and should be allowed to make any statement he may wish, and be permitted to cross-examine witnesses and to produce witnesses in defence of his character.

An officer or soldier whose conduct is the subject of investigation cannot refuse to attend a court of inquiry if duly ordered to do so, but he may decline to answer any questions or take any part in the proceedings.

When, in consequence of the assembly of a court of inquiry, a superior authority arrives at an opinion adverse to the character of an officer or soldier, such opinion should be communicated to the officer or soldier in question.

If an officer or soldier is subsequently tried by court-

martial the proceedings of the court of inquiry cannot be brought in evidence against him, but nevertheless he is himself entitled to a copy of its proceedings.

274. COURT ON ILLEGAL ABSENCE.—A court of inquiry for the purpose of declaring the illegal absence of a soldier is always held at the expiration of twenty-one days after the date of the absence, or as soon after as is practicable, unless the soldier, although still illegally absent, has been taken into custody. S. 72 R. 124 Q. vi 121 **177**

The court is usually composed of three officers, who, although not themselves sworn, are empowered to require the attendance of witnesses and examine them on oath.

The evidence is taken down in writing, and at the end of the proceedings the court is required to declare the fact of the man's absence, and any deficiencies of kit or equipment that may have been proved to exist at the date when he absented himself.

A copy of the declaration of the court is entered by the commanding officer in the regimental court-martial book, and the original proceedings may then be destroyed. The record thus made, or a duly attested copy thereof, is admissible as evidence of the facts therein contained if the soldier is afterwards brought to trial, and, if he is not apprehended, has the legal effect of a conviction by court-martial for desertion. Q. xxii 68

A court of this description is held when men of the Militia and Reserve Forces absent themselves without leave while subject to military law. R.F.A. 19 M.A. 28

275. BOARDS.—Committees and Boards differ only from Courts of Inquiry in so far that the objects for which they are assembled should not involve any point of discipline. Boards are usually convened to inspect transports, report on barrack damages and any loss of stores, inquire into Q. vi 124

the cause of fires or the loss of medals, inspect libraries and canteens, &c.

276. COURTS OF REQUEST are only held in India when troops are stationed beyond the jurisdiction of a small cause court. They are assembled by the commanding officer of the station, and are composed usually of five officers, each of whom must have had at least five years' service. S. 148

They can adjudicate on actions for debt or damage not exceeding 40*l*. which are brought by any person, other than an officer or soldier, against any person subject to military law, except a soldier of the regular forces.

They can award execution of the debt, or can order a sum, not exceeding half the pay of a public servant, to be stopped till the debt is paid; or, if the debtor does not receive pay from any public department, can imprison him for a period not exceeding two months, unless the debt be sooner paid.

277. COURTS OF INQUEST are held by the military authorities on all occasions of death accompanied by violence or suspicious circumstances, which occur in military prisons in India, when there is no civil authority competent to hold an inquest. S. 133 R. 126

278 REDRESS OF WRONGS.—If an officer thinks himself wronged by his commanding officer, and, on due application to him, does not receive the redress to which he may consider himself entitled, he may forward a complaint to the commander-in-chief through the usual channel. In the event of the commanding officer refusing or delaying unreasonably to forward the complaint it may be sent direct to the General in command, but the commanding officer should, at the same time, be apprised of the fact. S. 42 28

When a soldier has any complaint to make he should ask a non-commissioned officer to take him before the captain of his company, and should then make his appeal in a temperate tone and with a respectful manner. If redress is not obtained from the captain, the soldier may ask that the case be referred to the commanding officer, and if satisfaction is not then forthcoming, may further demand that his complaint be forwarded to the General of the district. S. 43

Complaints must always be forwarded through the regular channel, except when a captain or commanding officer refuses or unnecessarily delays to forward the appeal. When a direct application is, for the above cause, made, the captain or commanding officer passed over must be at once informed of the fact.

Officers and soldiers are, however, allowed to make a complaint direct to the inspecting officer at the time of the annual general inspection. Q. v 46.

279. RECORDING OFFENCES.—The offences committed by officers and soldiers are recorded in the following books :—

Officer's Court-martial Book.—This is kept as a confidential document by the commanding officer of every corps, and contains certified copies of all charges upon which an officer has been tried, together with the finding, sentence, and confirmation of the court that tried him. Q. xxii 61

Regimental Court-martial Book. — Each non-commissioned officer and soldier has one or more sheets allotted to him, upon which are entered the charges, findings, sentences, and minutes connected with the confirmation of courts-martial which have tried him. Q. xxii 62

The book also contains certified copies of convictions by the civil power for which a sentence exceeding seven days' imprisonment has been awarded, and copies of the declarations of courts of inquiry held to record the illegal absence of a soldier, and entries of any orders dispensing

with the trial of a man who confesses desertion or fraudulent enlistment. Q. vi. 152

Regimental Defaulters' Book.—In the defaulter sheets which compose the book are entered every— Q. xxii 52

1. Conviction by court-martial, or its equivalent, inflicted by a captain of H.M. troop-ships.

2. Dispensation from trial for desertion and fraudulent enlistment.

3. Conviction by civil courts (except a simple fine, which is entered or not at the discretion of general officers commanding).

4. Reduction of non-commissioned officer for a crime (by order of the commander-in-chief).

5. Imprisonment or award involving loss of pay.

6. Confinement to barracks exceeding seven days, and the equivalent punishment on board a troop-ship.

7. Punishment awarded to prisoners while in prison or cells.

8. Conviction under section 6, Reserve Force Act, of a man enrolled in the Army Reserve.

Company Defaulters' Book.—The troop, battery, or company defaulters' book contains a record of all offences of every description committed by non-commissioned officers and men for which punishment has been awarded. Q. xxii 85

280. COUNSEL.—A prisoner may have a friend or legal adviser to assist him during a trial, but such person, if not a counsel or an officer subject to military law acting as counsel, cannot examine witnesses, address the court, or take any part in the trial beyond giving advice to the prisoner. R. 85

A counsel, to be properly qualified, must be a barrister in England or Ireland or an advocate in Scotland, or elsewhere any person in a corresponding position. R. 91

An officer subject to military law who acts on behalf of the prisoner has all the rights and dutie of counsel.

A properly qualified counsel cannot be objected to.

Counsel is allowed to appear on behalf of the prosecutor or prisoner, and can be appointed to act as judge-advocate at all general courts-martial held in the United Kingdom, and those held elsewhere if the commander-in-chief or the convening officer thinks fit. R. 86 70 72

When counsel is engaged by one side, sufficient notice must be given to the other to enable it to also retain counsel. R. 87

Their duties.—A counsel has all the rights belonging to the person he represents, and can orally examine and cross-examine witnesses, make addresses, &c.; but the person he appears for cannot then do any of the above things.

A counsel for the prosecution should always make an opening address, and should state therein the substance of the charge and the general nature of the evidence he proposes to adduce. R. 88

Counsel, whether for the prosecution or the defence, should adhere strictly to the rules which govern the procedure of military and civil courts. They must not state as a fact any matter which is not proved or intended to be proved, nor give opinions as to facts before the court, nor make assumptions as to matters not proven. R. 90

If a counsel puts to a witness a question which is not *relevant*, except so far as it affects the credit of a witness by injuring his character, and the witness objects to answer, the court will decide whether the imputation intended to be conveyed by the question would, if true, seriously affect their opinion as to the credibility of the witness or not. If they think it would, they should insist on an answer being given; if they are of opinion it would not, they should disallow the question. 242

Statement by prisoner.—At any time before the second or principal address of his counsel the prisoner can make an oral statement in explanation of the subject of the charges against him; but such statement cannot be made on oath, nor is the prisoner liable to be examined thereon. 103

281. MARTIAL LAW.—In the preamble of the first Mutiny Act it was emphatically stated that no man could be 'subjected in time of peace to any kind of punishment within this realm by *martial law*;' and the same words are to be found in the Army Annual Act which is passed every year. 8

It is sometimes erroneously assumed that the existence of this clause shows that the civil law recognises that exercise of force which is generally understood by the term martial law. The misconception arises from the fact that for many years all military jurisdiction was termed martial law, and it was not till the commencement of the present century that it was clearly established that martial and military law were two essentially different things. Even now the patent appointing the judge-advocate general refers to him as the 'judge-marshal,' who takes cognizance of all matters relating to 'martial law,' whereas it is clear that his functions relate solely to military law.

It cannot be too strongly urged that such a thing as martial law is unknown to English jurisprudence. The law of England presupposes a state of peace, and disturbers of that peace can be found guilty of treason, felony, or misdemeanour according to circumstances.

On the other hand, no judicial decisions can alter the fact that the application of military government under the law of necessity commonly called martial law must always exist, although it is difficult to exactly define it.

In most foreign countries, certain laws are made applicable to a state of war or a state of siege or insurrection, when a city or country is either wholly or partially placed under military authority. In England no such regulations exist. When an authority is forced by necessity to suspend the ordinary legal procedure, it is for it to lay down the limits of its action, and to justify itself for using exceptional power.

Definitions.—The following definitions of martial law have at different times been given :—

'The law of the soldier applied to the civilian.'

'The union of legislative, judicial, and executive power in one person.'

'The will of the general of the army.'

'Sway exercised by a military commander over all persons, whether civil or military, within the precincts of his command in places where there is either no civil judicature, or the civil judicature has ceased to exist.'

Martial law, or the exercise of exceptional power by military authorities in cases of necessity where the ordinary law is superseded, may be considered under three main heads.

(1) *As applicable to soldiers.*—There may arise cases when a military officer would be justified, by the law of necessity, in inflicting punishments without having recourse to military courts. Thus, if five or six battalions were to mutiny in the field, a General might be justified in ordering artillery to fire into them, though such a course would not be authorised by either civil or military law.

(2) *As applicable to a conquered country.*—When a belligerent occupies an enemy's country, the ordinary civil laws of the country either cease to exist or continue only with the sanction and participation of the invader.

The whole country is placed under military government, and the commander of the victorious army deals with his own soldiers by means of military law, and with all other persons by such regulations under martial law as he deems expedient to make.

For instance, in the invasion of France in 1870, the Germans exercised military law over their soldiers, and martial law over the temporarily occupied provinces.

(3) *As applicable to a community in time of imminent danger.*—Cases of necessity may arise from time to time when it is necessary to use force for the suppression of wrong-doing, and to supplement the civil procedure by means of the action of military tribunals.

There is a conflict of opinion as to the proper authority

to proclaim martial law, and the prerogative of the Crown in this respect has been questioned. As a matter of fact there can be no doubt that if martial law were proclaimed *at home*, it would be done by means of an Act of Parliament, and that subsequently an Act of Indemnity would be passed in order to protect those who had acted in good faith in exercising their exceptional powers.

In the cases of disturbances abroad (such as the Jamaica riots in 1865) the Governor of the colony, who is the representative of the Crown, is the person who must proclaim martial law, and for his act in so doing he is responsible to the Crown, whether it be a Crown or settled colony, or whether he has or has not the sanction of any local legislature. An Act of Indemnity would, if necessary, be passed after martial law had ceased, by Parliament in the case of a Crown colony, and by a local legislature in the case of a settled colony.

282. REMARKS.—Controversies almost invariably follow the execution of martial law, and great caution must be exercised by those that carry it out, or they will find themselves the subject of legal proceedings. No definite rules have ever been laid down for the guidance of persons concerned, but the following principles are generally admitted to be sound, and should, as far as practicable, be followed :—

1. Martial law is not retrospective. An offender cannot be tried for a crime committed before martial law was proclaimed.

2. It does not extend beyond the proclaimed district, and an offender cannot be either arrested or tried beyond its limits.

3. It should never be kept in force longer than absolutely necessary.

4. The forms of military law should, as far as practicable, be adhered to.

INDEX.

[*The crimes specified in the Army Act, which have not been made the subject of special comment, are to be found in Chapter XVIII., and are not referred to in the Index.*

The numbers refer to paragraphs and not pages. When paragraphs deal consecutively with a subject the first or leading one only is quoted. Information on any particular point will, as a rule, be found without consulting the Index, by referring to the heading of the chapter under which it would naturally fall, in the Table of Contents.]

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